Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

October Term, 1997

JANE DOE #102,

*Petitioner,*

v.

GEORGIA DEPARTMENT OF CORRECTIONS,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court Of Georgia**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a state court or state legislature may discriminate against the federal cause of action set forth in 42 U.S.C. § 1983 by refusing to apply an otherwise applicable state tolling rule that is consistent with federal law to a § 1983 claim.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| TABLE OF AUTHORITIES | iv |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 3 |
| A. Petitioner's Allegations And Claims For Relief | 3 |
| B. Proceedings Below And Petitioner's Presentation Of A Federal Question | 4 |
| C. Finality | 9 |
| REASONS FOR GRANTING THE WRIT | 10 |
| I. THE RULING OF THE GEORGIA SUPREME COURT CONFLICTS WITH FEDERAL LAW | 12 |
| A. The Georgia Supreme Court's Refusal To Apply The Extended Limitations Period Of O.C.G.A. § 50-21-27(b) To Ms. Doe's § 1983 Claim Conflicts With *Tomanio, Hardin*, 42 U.S.C. § 1988 And The Supremacy Clause | 12 |
| B. In Refusing To Apply O.C.G.A. § 50-21-27(b) To Ms. Doe's § 1983 Claim, The Georgia Supreme Court Has Discriminated Against A Federal Cause Of Action In Violation Of *Howlett* And The Supremacy Clause | 17 |
| II. THE GEORGIA SUPREME COURT'S RULING UNDERMINES THE ABILITY OF CITIZENS TO VINDICATE FEDERAL CIVIL RIGHTS IN STATE COURTS | 22 |

TABLE OF CONTENTS – Continued

Page

CONCLUSION ..... 24

APPENDIX ..... 1a

## TABLE OF AUTHORITIES

Page

CASES

*Board of Regents v. Tomanio*, 446 U.S. 478 (1980) ..... 5, 6, 8, 11, 12, 14, 15, 16

*Brady v. Maryland*, 373 U.S. 83 (1963) ..... 9

*Carey v. Piphus*, 435 U.S. 247 (1978) ..... 13

*Chambers v. Mississippi*, 410 U.S. 284 (1973) ..... 8

*Chardon v. Fumero Soto*, 462 U.S. 650 (1983) .....5, 6

*City of Cave Spring v. Mason*, 252 Ga. 3, 310 S.E.2d 892 (1984) ..... 14

*Claflin v. Houseman*, 93 U.S. 130 (1876) ..... 16

*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) ..9, 10

*Davis v. City of Roswell*, 250 Ga. 8, 295 S.E.2d 317 (1982) ..... 14

*Dixon v. Chrans*, 986 F.2d 201 (7th Cir. 1993) ..... 21

*Felder v. Casey*, 487 U.S. 131 (1988) ..... 19

*Hardin v. Straub*, 490 U.S. 536 (1989) ..... 11, 12, 14, 15, 16, 24

*Heck v. Humphrey*, 512 U.S. 477 (1994) ..... 13

*Howlett v. Rose*, 496 U.S. 356 (1990) ...11, 16, 17, 19, 24

*Hughes v. Sheriff of Fall River County Jail*, 814 F.2d 532 (8th Cir. 1987) .....11, 19

*McKnett v. St. Louis & San Francisco Ry. Co.*, 292 U.S. 230 (1934) ..... 20

*Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555 (1963) ..... 10

TABLE OF AUTHORITIES – Continued

Page

*Mitchum v. Foster*, 407 U.S. 225 (1972) ..... 15

*New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928) ..... 8

*North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973) ..... 10

*Poss v. Moreland*, 253 Ga. 730, 324 S.E.2d 456, *cert. dismissed*, 474 U.S. 807 (1985) ..... 14

*Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945) ..... 9, 10

*Republic Pictures Corp. v. Kappler*, 151 F.2d 543 (8th Cir. 1945), *aff'd per curiam without opinion*, 327 U.S. 757 (1946) ..... 20

*Robertson v. Wegmann*, 436 U.S. 584 (1978) ..... 15

*Street v. New York*, 394 U.S. 576 (1969) ..... 8

*Williams v. City of Atlanta*, 794 F.2d 624 (11th Cir. 1986) ..... 4

*Wilson v. Garcia*, 471 U.S. 261 (1985) ..... 4, 16, 23

STATUTES

1992 Ga.Laws 1883, 1895 ..... 13

O.C.G.A. § 9-3-33 ..... 4, 6, 7, 8, 13

O.C.G.A. § 50-21-1 *et seq.* ..... 4

O.C.G.A. § 50-21-27 ..... 6

O.C.G.A. § 50-21-27(a) ..... 13

O.C.G.A. § 50-21-27(b) ..... *passim*

28 U.S.C. § 1257(a) ..... 1, 9

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1988 ..... 5, 6, 11, 12, 16

42 U.S.C. § 1988(a) ..... 2

United States Constitution, Article VI ..... 2

OTHER AUTHORITIES

90 Harv. L. Rev. 489 (1977) ..... 23

## PETITION FOR WRIT OF CERTIORARI

Jane Doe #102 respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Georgia.

## OPINIONS BELOW

The opinion of the Supreme Court of Georgia (App., *infra*, 1a-3a) is reported at 492 S.E.2d 516 (Ga. 1997) and is not yet reported in the official Georgia reports. The opinion of the Court of Appeals of the State of Georgia (App., *infra*, 4a-6a), which transferred petitioner's appeal to the Georgia Supreme Court, is not reported. The opinions of the State Court of Baldwin County (App., *infra*, 7a-10a) and the State Court of Fulton County (App., *infra*, 11a) are also unreported.

## JURISDICTION

The Supreme Court of Georgia entered its judgment on November 3, 1997. App., *infra*, 1a. This Court has jurisdiction to review that judgment pursuant to 28 U.S.C. § 1257(a).

## STATUTORY PROVISIONS INVOLVED

United States Constitution, Article VI (Supremacy Clause):

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

42 U.S.C. § 1988(a):

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

O.C.G.A. § 50-21-27(b) (1994):

> For tort claims and causes of action which accrued between January 1, 1991, and July 1, 1992, any tort action brought pursuant to this article is forever barred unless it is commenced within two years after July 1, 1992.

## STATEMENT OF THE CASE

### A. Petitioner's Allegations And Claims For Relief

Petitioner Jane Doe #102 is a prisoner in the custody of Respondent Georgia Department of Corrections. Ms. Doe is one of many women who were victimized by respondent's mismanagement of the Georgia Women's Correctional Institution ("GWCI"). App., *infra*, 29a-31a. Petitioner is identified only as Jane Doe #102 pursuant to an order entered by the United States District Court for the Middle District of Georgia in *Cason v. Seckinger*, C.A. No. 84-313-MAC(CWH), a class action challenging unconstitutional conditions of confinement at GWCI. *Id.* at 1a n.1.

Ms. Doe came to GWCI with a history of mental illness diagnosed as chronic paranoid schizophrenia. She alleges that on two occasions in 1991, in lieu of appropriate mental health treatment, correctional officers at GWCI removed her clothing, bound her in a straitjacket, "hog-tied" her arms and ankles, injected drugs into her over her objection and without proper medical authorization and left her in a stripped cell under the gaze of male staff. Ms. Doe contends that this abuse persisted for days.

On June 27, 1994, Ms. Doe filed an action against respondent under the Georgia Tort Claims Act, O.C.G.A. § 50-21-1, *et seq.* Ms. Doe's complaint included a claim under 42 U.S.C. § 1983 for deprivation of her federal civil rights, a claim under the Georgia Constitution for violation of her state civil rights and a claim for intentional infliction of emotional distress. Ms. Doe's claim under § 1983 alleges violations of her rights under the Fourth, Eighth, Tenth and Fourteenth Amendments to the United States Constitution.

### B. Proceedings Below And Petitioner's Presentation Of A Federal Question

Ms. Doe filed her complaint in the State Court of Fulton County, Georgia. Respondent moved to dismiss the complaint or in the alternative to transfer the action to Baldwin County, Georgia. The State Court of Fulton County denied the motion to dismiss, but granted the motion to transfer. App., *infra*, 11a.

On February 19, 1996, respondent re-urged its motion to dismiss in the State Court of Baldwin County (the "trial court"). Respondent contended, *inter alia*, that the statute of limitations barred Ms. Doe's § 1983 claim. Respondent noted that Georgia's two-year statute of limitations for personal injuries, O.C.G.A. § 9-3-33 (1982), generally governs § 1983 claims. *See Williams v. City of Atlanta*, 794 F.2d 624 (11th Cir. 1986) (applying *Wilson v. Garcia*, 471 U.S. 261 (1985)). Respondent argued that because Ms. Doe's claims accrued in 1991 and because she did not file suit until June 27, 1994, more than two

years later, the statute of limitations barred her § 1983 claim.

Ms. Doe opposed respondent's motion. She argued that a provision of the Georgia Tort Claims Act, O.C.G.A. § 50-21-27(b), extended the limitations period for *all* of her claims, including her § 1983 claim. App., *infra*, 24a-27a. Section 50-21-27(b) provides:

> For tort claims and causes of action which accrued between January 1, 1991, and July 1, 1992, any tort action brought pursuant to this article is forever barred unless it is commenced within two years after July 1, 1992.

O.C.G.A. § 50-21-27(b). Because all of Ms. Doe's causes of action, including her § 1983 claim, accrued in 1991, she argued that her entire complaint, which was filed on June 27, 1994, "within two years after July 1, 1992," was timely. *Id.*

Ms. Doe specifically contended that this Court's decisions in *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), and *Chardon v. Fumero Soto*, 462 U.S. 650 (1983), as well as 42 U.S.C. § 1988, required the trial court to apply the tolling rule set forth in § 50-21-27(b) to her § 1983 claim. App., *infra*, 24a-27a. This Court stated in *Tomanio* that "[i]n § 1983 actions . . . a state statute of limitations **and the coordinate tolling rules** are more than a technical obstacle to be circumvented if possible. In most cases, they are **binding rules of law.**" 446 U.S. at 484 (emphasis supplied). Under *Tomanio*, a court may "disregard an otherwise applicable state rule of law **only** if the state law is 'inconsistent with the Constitution and laws of the

United States.' " *Id.* at 485 (emphasis supplied) (*quoting* 42 U.S.C. § 1988).

The trial court granted respondent's motion to dismiss. App., *infra*, 7a-10a. The trial court held that Ms. Doe had not complied with the ante litem notice provisions of the Georgia Tort Claims Act and thus that her entire complaint was barred. *Id.* at 9a-10a.

The trial court also concluded that Ms. Doe's § 1983 claim was barred by the statute of limitations. *Id.* at 8a-9a. The court first determined that the two-year statute of limitations in O.C.G.A. § 9-3-33 applies to § 1983 claims filed in Georgia courts. *Id.* at 8a. The court then ruled that because Ms. Doe's injuries occurred in 1991 and because she filed suit more than two years later, her § 1983 claim was untimely. *Id.* at 8a-9a.

The trial court rejected without analysis Ms. Doe's contention that the time for filing her § 1983 claim, like the time for filing her other tort claims, was tolled by O.C.G.A. § 50-21-27(b). The trial court stated, "Plaintiff asserts that the provisions of O.C.G.A. § 50-21-27 extend the applicable period of limitations for § 1983 claims and that, accordingly, Plaintiff had two years from July 1, 1992, in which to file her complaint. This court disagrees." *Id.* at 8a.

Ms. Doe appealed the trial court's order to the Georgia Court of Appeals. In her brief and enumeration of errors, Ms. Doe again raised the argument that federal law (*Tomanio, Chardon*, § 1988) required the trial court to apply the extended limitations period of § 50-21-27(b) to her § 1983 claim. *Id.* at 18a-23a.

After hearing oral argument, the Georgia Court of Appeals transferred Ms. Doe's appeal to the Georgia Supreme Court. In her brief and enumeration of errors, Ms. Doe presented to the Georgia Supreme Court her contention that federal law requires application of § 50-21-27(b) to her § 1983 claim. *Id.* at 12a-17a.

The Georgia Supreme Court held that Ms. Doe *had* timely complied with the ante litem notice provisions of the Georgia Tort Claims Act and reversed the trial court's dismissal of her complaint. *Id.* at 3a.

The Georgia Supreme Court, however, affirmed the dismissal of Ms. Doe's § 1983 claim on statute of limitations grounds:

> The Baldwin County court correctly dismissed the federal civil rights claims as untimely. The two-year statute of limitation in OCGA § 9-3-33 governs claims brought under 42 U.S.C. § 1983 because such claims are most accurately characterized as personal injury actions. Contrary to Doe's assertion, this is not changed by OCGA § 50-21-27(b), **as its terms do not call for an extension of the period for filing § 1983 claims.** The GTCA [Georgia Tort Claims Act] represents a waiver of the State's sovereign immunity, limited in extent and manner. As such its provisions should be narrowly construed. Consequently, it does not expand the State's exposure for such federal claims beyond that expressly provided by the legislature in OCGA § 9-3-33.

*Id.* at 2a-3a (citations and footnote omitted) (emphasis supplied).[1]

The Georgia Supreme Court thus held that § 50-21-27(b) does not apply to § 1983 claims because the Georgia legislature did not expressly provide that the statute's extended limitations period would reach such claims. This holding is based on the notion that a state court or state legislature may refuse to apply an otherwise applicable state tolling rule to the federal cause of action set forth in 42 U.S.C. § 1983.

While the Georgia Supreme Court failed to address explicitly the requirements of *Tomanio*, 42 U.S.C. § 1988 or the Supremacy Clause, "the necessary effect of the judgment [was] to deny [Ms. Doe's] claim" that **federal law** requires application of § 50-21-27(b) to her § 1983 claim. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). Ms. Doe repeatedly "brought [this claim] to the attention of the state court[s]," including the Georgia Supreme Court. *Id.*; *see* App., *infra*, 12a-28a. She thus "adequately presented" her federal claim, and that claim is reviewable by this Court. *Bryant*, 278 U.S. at 67; *see Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973) ("despite the State Supreme Court's failure to address the constitutional issue," issue was properly before this Court as petitioner repeatedly presented it to state courts); *Street v. New York*, 394 U.S. 576, 582-85 (1969).

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[1] The meaning of the last sentence in the Georgia Supreme Court's opinion is difficult to discern. 42 U.S.C. § 1983 establishes the state's "exposure for [the] federal claims" in this case. Section 9-3-33 does not refer to any federal claims.

### C. Finality

The Georgia Supreme Court's affirmance of the dismissal of Ms. Doe's § 1983 claim is a final decision under 28 U.S.C. § 1257. This Court follows a "pragmatic approach" to finality. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 486 (1975). Here, the Georgia Supreme Court's ruling permits Ms. Doe to pursue her state law claims on remand, but precludes her from pursuing her federal claim (and thus precludes her from seeking remedies, such as attorneys' fees and punitive damages, that are available under § 1983, but not under state law). As Ms. Doe is now limited to presenting state law claims in the trial court, she will not have another opportunity to raise or to seek review of her contention that the Georgia courts' refusal to apply § 50-21-27(b) to her federal cause of action violates federal law.

This appeal thus fits the category of "cases such as [*Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945)] and *Brady v. Maryland*, 373 U.S. 83 (1963), in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings" and which this Court has therefore treated as final. *Cox Broadcasting*, 420 U.S. at 480. As in *Radio Station WOW* and *Brady*, the question of whether the trial court's refusal to apply § 50-21-27(b) to Ms. Doe's § 1983 claim violates federal law is "dissociated from . . . independent of, and unaffected by" the merits of her state law claims. *Radio Station WOW*, 326 U.S. at 126; *see Brady*, 373 U.S. at 84 n.1 (question of whether Fourteenth Amendment entitled petitioner to new trial as to guilt was 'independent of,

and unaffected by' future proceeding to determine petitioner's punishment) (citation omitted).

The Georgia Supreme Court has finally decided the federal question raised by Ms. Doe – that question cannot be raised again below. "[T]he Federal question[ ] that could come here [has] been adjudicated by the State court, and [the state law trial] which remains to be taken could not remotely give rise to a Federal question." *Radio Station WOW*, 326 U.S. at 127. The Georgia Supreme Court's decision is thus final. *See Cox Broadcasting*, 420 U.S. 469 (holding Georgia Supreme Court's decision as to constitutionality of state statute final where issue would not be involved in proceedings on remand); *see also North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 162 (1973) (holding state Supreme Court decision final where petitioner has "no way" to "preserv[e] the constitutional question now ripe for decision"); *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 557-58 (1963) (decision as to "separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action" is final).[2]

## REASONS FOR GRANTING THE WRIT

This Court should grant Ms. Doe's petition and summarily reverse the decision of the Georgia Supreme Court because that decision (1) directly conflicts with two lines

[2] This case may also fit the third category of final decisions identified in *Cox Broadcasting*, 420 U.S. at 481.

of authority issued by this Court and with the Supremacy Clause of the United States Constitution and (2) interferes with the efforts of United States citizens to vindicate federal rights in state courts.

The Georgia Supreme Court's ruling directly conflicts with this Court's decisions in *Tomanio* and *Hardin v. Straub*, 490 U.S. 536 (1989), and with 42 U.S.C. § 1988. Those authorities dictate that state tolling rules such as § 50-21-27(b) *must* be applied to § 1983 claims as long as those rules are consistent with federal law. The Supremacy Clause dictates that state courts follow this principle in resolving § 1983 claims. The application of § 50-21-27(b) to Ms. Doe's § 1983 claim is a matter of *federal law*, not, as the lower court found, a matter of state legislative grace.

The Georgia Supreme Court's ruling also conflicts with this Court's decision in *Howlett v. Rose*, 496 U.S. 356 (1990), and with the Eighth Circuit's decision in *Hughes v. Sheriff of Fall River County Jail*, 814 F.2d 532 (8th Cir. 1987). Those cases establish that a state may not discriminate against the federal cause of action in § 1983 by refusing to apply an otherwise applicable tolling rule to § 1983 claims.

If the Georgia Supreme Court's decision stands, the application of state tolling rules to § 1983 claims will become a matter decided by state legislatures rather than a matter of federal law. Under the lower court's decision, states would be free to burden § 1983 claims by passing extremely short personal injury statutes of limitation and then tolling those statutes for all causes of action other than § 1983 claims.

## I. THE RULING OF THE GEORGIA SUPREME COURT CONFLICTS WITH FEDERAL LAW.

### A. The Georgia Supreme Court's Refusal To Apply The Extended Limitations Period Of O.C.G.A. § 50-21-27(b) To Ms. Doe's § 1983 Claim Conflicts With *Tomanio*, *Hardin*, 42 U.S.C. § 1988 And The Supremacy Clause.

The Georgia Supreme Court's ruling in this case directly contravenes this Court's pronouncement in *Tomanio* and the command of 42 U.S.C. § 1988 that state tolling rules apply to § 1983 claims if those rules are consistent with federal law. This Court held in *Tomanio* that "[i]n § 1983 actions . . . a state statute of limitations **and the coordinate tolling rules** are more than a technical obstacle to be circumvented if possible. In most cases, they are **binding rules of law**." 446 U.S. at 484 (emphasis supplied). A court may "disregard an otherwise applicable state rule of law **only** if the state law is 'inconsistent with the Constitution and laws of the United States.' " *Id.* at 485 (emphasis supplied) (*quoting* 42 U.S.C. § 1988).

The Georgia Supreme Court, however, "disregard[ed]" § 50-21-27(b), "an otherwise applicable state rule of law" on the purported basis that "its terms do not call for an extension of the period for filing § 1983 claims." *Id.*; App., *infra*, 3a. This refusal to apply § 50-21-27(b) to Ms. Doe's § 1983 claim is inconsistent not only with *Tomanio*, but with the language of § 50-21-27(b) itself, *Hardin v. Straub*, and the Supremacy Clause.

***The Language Of § 50-21-27(b).*** Section 50-21-27(b) does, by its terms, apply to § 1983 claims. The provision extends the statute of limitations, without exception, for

*all* "tort claims and causes of action" accruing between January 1, 1991 and July 1, 1992.

In April 1992, the Georgia legislature approved a Tort Claims Act "to provide a remedy for torts committed by state officers and employees." The Georgia Tort Claims Act, No. 1135, 1992 Ga. Laws 1883. The Act became effective on July 1, 1992, but was retroactive to tort claims accruing on or after January 1, 1991. *Id.* at 1895; O.C.G.A. § 50-21-27(a). Given Georgia's two-year statute of limitations for personal injuries, (O.C.G.A. § 9-3-33), persons with tort claims accruing in 1991 had little time left to file claims under the new Act. Section 50-21-27(b) thus extended the limitations period for "tort claims and causes of action" accruing between January 1, 1991 and July 1, 1992 until two years after July 1, 1992. O.C.G.A. § 50-21-27(b).

A claim for relief under 42 U.S.C. § 1983 is both a "cause[ ] of action" and a "tort claim[ ]." *Id.*; *see Heck v. Humphrey*, 512 U.S. 477, 483 (1994) (" 'We have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability.' ") (citation omitted); *Carey v. Piphus*, 435 U.S. 247, 253 (1978) ("The legislative history of § 1983, elsewhere detailed, demonstrates that it was intended to '[create] a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution.") (citations omitted). Thus, the express language of § 50-21-27(b) does reach § 1983 claims.[3]

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[3] At the time the Georgia legislature passed § 50-21-27(b), it was well-settled that litigants could bring § 1983 claims in

***Hardin v. Straub.*** In refusing to apply § 50-21-27(b) to Ms. Doe's § 1983 claim, the Georgia Supreme Court treated that statute as "a technical obstacle to be circumvented" rather than as a "binding rule[ ] of law." *Tomanio*, 446 U.S. at 484. Such treatment is inconsistent with *Hardin v. Straub*, 490 U.S. 536 (1989), which specifically applied a state tolling rule to a prisoner's § 1983 claim.

In *Hardin*, the Sixth Circuit Court of Appeals "refused to apply [to a prisoner's § 1983 claim] a Michigan statute that suspends limitations periods for persons under a legal disability [including imprisonment] until one year after the disability has been removed." 490 U.S. at 537. The Sixth Circuit based this refusal on its holding that application of a lengthy tolling period to § 1983 claims would contravene an alleged federal policy of resolving such claims as promptly as practicable. "Because that holding appeared to conflict with [this Court's] decision in [*Tomanio*], [the Court] granted certiorari" and reversed. *Id.* at 537.

This Court first reaffirmed that "[l]imitations periods in § 1983 suits are to be determined by reference to the appropriate 'state statute of limitations and the coordinate tolling rules.' " *Id.* at 539 (emphasis supplied) (citation omitted). The Court then held that the Michigan statute was consistent with federal law: "A State's decision to toll the statute of limitations during the inmate's disability does not frustrate § 1983's compensation goal.

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Georgia courts. *See Davis v. City of Roswell*, 250 Ga. 8, 295 S.E.2d 317 (1982); *City of Cave Spring v. Mason*, 252 Ga. 3, 310 S.E.2d 892 (1984); *Poss v. Moreland*, 253 Ga. 730, 324 S.E.2d 456, *cert. dismissed*, 474 U.S. 807 (1985).

Rather, it enhances the inmate's ability to bring suit and recover damages for injuries. Nor does the State's decision to toll its statute of limitations hinder § 1983's deterrence interest. . . . Such a statute is consistent with § 1983's remedial purpose." *Id.* at 543-44. Thus, the lower courts could not "decline[ ] to apply" the Michigan tolling rule. *Id.*

This case involves a more serious conflict with *Tomanio* than did *Hardin* because the Georgia Supreme Court refused to apply § 50-21-27(b) without even considering whether that statute is consistent with federal law. Section 50-21-27(b) *is* consistent with federal law and the policies underlying § 1983 and *must* be applied to § 1983 claims.

Section 50-21-27(b) serves § 1983's "chief goals of compensation and deterrence." *Id.* at 539; *see Robertson v. Wegmann*, 436 U.S. 584, 590-91 (1978) ("The policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law."). The statute serves these ends by providing persons who suffered violations of their rights at the hands of state officials (during the eighteen month period between January 1, 1991 and July 1, 1991) additional time to seek redress for such violations. By allowing citizens whose claims would otherwise be barred to challenge official conduct, section 50-21-27(b) fosters § 1983's goal of providing compensation for and deterring " 'incursions . . . upon rights secured by the Constitution and laws of the Nation.' " *Hardin*, 490 U.S. at 539 n.5 (*quoting Mitchum v. Foster*, 407 U.S. 225, 239 (1972)).

***The Supremacy Clause.*** The Georgia Supreme Court's refusal to comply with the mandate of *Tomanio, Hardin* and 42 U.S.C. § 1988 that state tolling rules apply to § 1983 claims violates the Supremacy Clause of the United States Constitution. As this Court stated in *Howlett v. Rose*, 496 U.S. 356 (1990):

> Federal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular mode of procedure. "The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country. . . . "

496 U.S. at 367 (*quoting Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876)).

The Georgia Supreme Court followed the directive in *Wilson v. Garcia*, 471 U.S. 261 (1985), and 42 U.S.C. § 1988 that it look to state law for the statute of limitations applicable to Ms. Doe's § 1983 claim. App., *infra*, 2a (citing *Wilson*). That court is similarly bound to follow the directive in *Tomanio* and § 1988 that it apply state tolling rules to § 1983 claims. This Court should grant certiorari

to enforce the Georgia Supreme Court's compliance with federal law.

### B. In Refusing To Apply O.C.G.A. § 50-21-27(b) To Ms. Doe's § 1983 Claim, The Georgia Supreme Court Has Discriminated Against A Federal Cause Of Action In Violation Of *Howlett* And The Supremacy Clause.

The Georgia Supreme Court has applied § 50-21-27(b) to provide an extended limitations period for all "tort claims and causes of action" *except § 1983 claims*. This Court's decision in *Howlett v. Rose*, 496 U.S. 356 (1990), and the Supremacy Clause forbid such discrimination against § 1983 claims.

The Georgia Supreme Court's construction and application of § 50-21-27(b) directly conflict with *Howlett*. *Howlett* concerned a Florida statute that waived the state's sovereign immunity for tort claims brought in state court. Like the Georgia Supreme Court in this case, the Florida District Court of Appeal in *Howlett* construed the statute at issue as waiving sovereign immunity *only* for state law claims and *not* for § 1983 claims.[4] This holding "raise[d] the concern that the state court [might] be evading federal law and discriminating against federal

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[4] The Florida District Court of Appeal was following a decision of the Florida Supreme Court which held, " 'The recovery ceilings in section 768.28 [the statute at issue] were intended to waive sovereign immunity for state tort actions, not federal civil rights actions commenced under section 1983.' " *Howlett*, 496 U.S. at 364 (citation omitted).

causes of action." 496 U.S. at 366. "In view of the importance of the question decided by the [Florida] Court of Appeal, [this Court] granted certiorari" and reversed. *Id.* at 360.

This Court refused to countenance the Florida courts' differential treatment of state law claims and § 1983 claims: "[T]he Florida court's refusal to entertain one discrete category of § 1983 claims, when the court entertains similar state-law actions against state defendants, violates the Supremacy Clause." 496 U.S. at 375. The Supremacy Clause does not permit states to engage in unequal treatment of federal actions against state officials:

> A state policy that permits actions against state agencies for the failure of their officials to adequately police a parking lot and for the negligence of such officers in arresting a person on a roadside, but yet declines jurisdiction over federal actions for constitutional violations by the same persons can be based only on the rationale that such persons should not be held liable for § 1983 violations in the courts of the State. That reason, whether presented in terms of direct disagreement with substantive federal law or simple refusal to take cognizance of the federal cause of action, flatly violates the Supremacy Clause.

496 U.S. at 380-81.[5]

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[5] The Georgia Supreme Court's application and construction of § 50-21-27(b) were apparently motivated by an attempt to minimize the state's exposure to liability for federal tort claims. App., *infra*, 3a ("The GTCA represents a waiver of

The Georgia Supreme Court's decision discriminates against § 1983 claims in the precise manner prohibited by *Howlett*. Under the Georgia Supreme Court's ruling, Ms. Doe's state law tort claims and causes of action for intentional infliction of emotional distress and violations of the Georgia Constitution receive the benefit of the extended limitations period in § 50-21-27(b). It is only her § 1983 claim that is excluded from the reach of that statute.[6]

The Eighth Circuit's decision in *Hughes v. Sheriff of Fall River County Jail*, 814 F.2d 532 (8th Cir. 1987), which involves facts almost identical to those at issue here, demonstrates that a state's refusal to apply an otherwise applicable state tolling provision to § 1983 claims violates the Supremacy Clause. *Hughes* concerned a South Dakota statute that tolled statutes of limitations for prisoners *unless* the prisoners were asserting federal civil rights claims; the statute contained a general extension of time for filing civil actions, but specifically excluded federal

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the State's sovereign immunity, limited in extent and manner. As such its provisions should be narrowly construed.") (citations omitted).

[6] This Court has overturned state court decisions that construe state statutes to burden § 1983 claims indirectly as well as directly. In *Felder v. Casey*, 487 U.S. 131 (1988), this Court reversed a Wisconsin Supreme Court decision holding that a notice-of-claim provision governing suits against state officials in Wisconsin courts applied to § 1983 claims: "[T]he notice provision discriminates against the federal right. While the State affords the victim of an intentional tort two years to recognize the compensable nature of his or her injury, the civil rights victim is given only four months to appreciate that he or she has been deprived of a federal constitutional or statutory right." 487 U.S. at 141-42; *see id.* at 144-46.

civil rights suits from its reach.[7] By interpreting § 50-21-27(b), which also contains a general extension of time for filing "tort claims and causes of action," to exclude § 1983 claims, the Georgia Supreme Court has given that statute the same effect.

Rejecting South Dakota's attempt to exclude federal civil rights claims from the tolling provision at issue, the Eighth Circuit noted the well-settled principle that states may not discriminate against federal causes of action:

> A state may not discriminate against rights accruing under federal laws. . . .
>
> . . . [Plaintiff's] claim or cause of action is discriminated against solely because it arises under a federal statute. This discriminatory treatment . . . in effect makes inferior congressional enactments and rights which under our jurisprudence are intended to be paramount and supreme. . . .

814 F.2d at 534 (*quoting Republic Pictures Corp. v. Kappler*, 151 F.2d 543 (8th Cir. 1945), *aff'd per curiam without opinion*, 327 U.S. 757 (1946)); *see McKnett v. St. Louis & San Francisco Ry. Co.*, 292 U.S. 230, 234 (1934) ("The denial of jurisdiction by the Alabama court is based solely upon

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[7] The South Dakota statute provided, "If a person entitled to bring an action other than for the recovery of real property, except for a penalty or forfeiture or against a Sheriff or other officer for an escape, be at the time the cause of action accrued . . . (3) Imprisoned on a criminal charge; or in the execution of a sentence of a criminal court for a term less than his natural life; the time of such disability is not part of the time limited for the commencement of the action. . . . **The provisions of subdivision (3) do not apply to federal civil rights cases.**" 814 F.2d at 533-34 n.2 (*quoting* S.D.C.L. § 15-2-22) (emphasis supplied).

the source of law sought to be enforced. The plaintiff is cast out because he is suing to enforce a federal act. A state may not discriminate against rights arising under federal laws.") (citation omitted).

South Dakota's attempt to exclude federal civil rights claims from the benefit of its tolling provision violated this principle of non-discrimination:

> S.D.C.L. § 15-2-22 works a similar discrimination against federal rights. Had [plaintiff] brought suit under South Dakota tort law for precisely the same occurrences and actions that are the subject of his 42 U.S.C. § 1983 claim, he would have had the benefit of the tolling effects of § 15-2-22. However, solely because he has sued under a federal civil rights statute, § 15-2-22 would not toll the statute on [plaintiff's] action. **South Dakota has singled out federal claims, subjecting them to more restrictive tolling provisions than those governing analogous state-law claims.** Section 15-2-22's exclusion of federal civil-rights claims from the tolling effects of § 15-2-22(3) is thus inconsistent with federal law, and should not be incorporated to govern federal civil-rights claims.

814 F.2d at 534-35 (emphasis supplied). The same analysis applies to the Georgia Supreme Court's attempt to exclude § 1983 claims from the benefit of the extended limitations period in § 50-21-27(b).

The Seventh Circuit's decision in *Dixon v. Chrans*, 986 F.2d 201 (7th Cir. 1993), further establishes that a state may not exclude § 1983 claims from the benefit of an otherwise applicable tolling rule. In *Dixon*, the Illinois legislature amended a state statute that provided for the

tolling of suits by prisoners to exclude suits against the Department of Corrections or its officials. The Seventh Circuit held that this exception was "inconsistent with § 1983" and that the plaintiff was entitled to the benefit of the tolling statute in his suit against prison officials. 986 F.2d at 205-06. The Court of Appeals noted:

> **[W]hile a state may choose not to confer a tolling benefit at all, it may not generally confer such a benefit but withhold it with respect to claims brought against government officials when this results in a burden on a federal cause of action.**

*Id.* at 205 (citation omitted) (emphasis supplied).

This Court should grant certiorari to ensure that state courts do not treat federal civil rights laws as inferior enactments.

## II. THE GEORGIA SUPREME COURT'S RULING UNDERMINES THE ABILITY OF CITIZENS TO VINDICATE FEDERAL CIVIL RIGHTS IN STATE COURTS.

The Georgia Supreme Court's discriminatory treatment of Ms. Doe's § 1983 claim threatens to deter citizens from vindicating federal rights in state courts and to provide an avenue for state legislatures to vitiate federal civil rights laws. As Justice Brennan noted more than twenty years ago, state courts provide an important forum for the protection of federal civil rights:

> In recent years, however, another variety of federal law – that fundamental law protecting all of us from the use of governmental powers in

> ways inconsistent with American conceptions of human liberty – has dramatically altered the grist of the state courts. . . . And while [United States Supreme Court] decisions have been accompanied by the enforcement of federal rights by federal courts, they have significantly altered the work of state court judges as well. This is both necessary and desirable under our federal system – state courts no less than federal are and ought to be the guardians of our liberties.

90 Harv. L. Rev. 489, 490-91 (1977).

The Georgia Supreme Court's ruling in this case, however, threatens to undermine the role of state courts as protectors of federal liberties. Litigants are unlikely to choose to vindicate federal rights in state courts if those courts are free to discriminate against federal causes of action. Such a situation would lead all federal civil rights plaintiffs to file their actions in the already over-burdened federal courts and would herald a return to a "one-tier" system for the protection of federal rights.

Further, the Georgia Supreme Court's decision opens a potential avenue for state legislatures to undermine § 1983 claims entirely. Under the Georgia Supreme Court's analysis, a state legislature could enact an extremely short statute of limitations – perhaps, three months – for the filing of personal injury actions. Pursuant to *Wilson v. Garcia*, state courts would apply this statute of limitations in § 1983 actions. The legislature could then enact a provision that tolled or extended the statute of limitations for all causes of action other than § 1983 claims. Under the Georgia Supreme Court's decision, such a statute would be valid.

This Court should, as it did in *Hardin* and *Howlett*, protect federal civil rights claims from unequal treatment by state courts and state legislatures.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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**In The Supreme Court of Georgia**

Decided: **Nov. 03, 1997**

S97A0739. JANE DOE #102 v. GEORGIA DEPARTMENT OF CORRECTIONS.

HINES, Justice.

This is an appeal from the dismissal of an action for damages brought under the Georgia Tort Claims Act (GTCA), OCGA § 50-21-20 et seq. Inmate Jane Doe #102, filed the suit against the Department of Corrections (DOC) for injuries stemming from her alleged mistreatment while in custody in 1991 at Georgia Women's Correctional Institution at Hardwick in Baldwin County.[1]

Doe asserted the intentional infliction of emotional distress and violations of her rights under the State Constitution and 42 U.S.C. § 1983. The action was originally filed in the State Court of Fulton County. The DOC moved to dismiss claiming improper venue, that Doe failed to comply with the ante litem notice provision of the GTCA, that the § 1983 claims were barred by the applicable two-year statute of limitation of OCGA § 9-3-33, and that the DOC was not a "person" subject to suit within the meaning of 42 U.S.C. § 1983. In the alternative, the DOC asked that venue be transferred to Baldwin County as required by OCGA § 50-21-28, the venue provision of the GTCA. The Fulton County court denied the motion to dismiss but transferred the action to the State Court of Baldwin County. The DOC again moved to

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[1] The plaintiff is identified as Jane Doe #102 in accordance with a protective order entered by the United States District Court for the Middle District of Georgia in *Cason v. Seckinger*, Civil Action No. 84-313-1-MAC(CWH).

dismiss. The Baldwin County court dismissed the complaint after finding that the § 1983 claims were untimely and that the state law causes were barred by Doe's failure to comply with the GTCA's ante litem notice requirement. For the reasons which follow, we affirm the adverse ruling on the federal claims, but reverse the dismissal of alleged violations of state law.

1. This action was properly transferred to Baldwin County. The enactment of the venue limitation in the GTCA found in OCGA § 50-21-28[2] is a valid exercise of the General Assembly's authority under Article I, Section II, Paragraph IX (a) of the 1983 Georgia Constitution, and establishes the proper venue in actions brought under the GTCA and against the State as the sole defendant. *Campbell v. Department of Corrections,* Ga. (Case No. S97A0767, Decided September 22, 1997.)

2. The Baldwin County court correctly dismissed the federal civil rights claims as untimely. The two-year statute of limitation in OCGA § 9-3-33 governs claims brought under 42 U.S.C. § 1983 because such claims are most accurately characterized as personal injury actions. *Battle v. Sparks,* 211 Ga. App. 106, 107 (438 SE2d 185) (1993); *Day v. Brown,* 207 Ga. App. 134 (427 SE2d 104) (1993). See also *Owens v. Okure,* 488 U.S. 235 (109 SC 573, 102 LE2d 594) (1989); *Wilson v. Garcia,* 471 U.S. 261 (105 SC 1938, 85 LE2d 254) (1985); *Giles v. Garwood,* 853 F.2d 876 (11th Cir. 1988); *Williams v. City of Atlanta,* 794 F.2d 624 (11th Cir. 1986). Contrary to Doe's assertion, this is

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[2] OCGA § 50-21-28 provides in relevant part, "[a]ll tort actions against the state under [the GTCA] shall be brought in the state or superior court of the county wherein the loss occurred."

not changed by OCGA § 50-21-27 (b),[3] as its terms do not call for an extension of the period for filing § 1983 claims. The GTCA represents a waiver of the State's sovereign immunity, limited in extent and manner. OCGA § 50-21-23 (a) & (b). See also OCGA §§ 50-21-21, 50-21-25 (a). As such its provisions should be narrowly construed. *Howard v. State of Ga.*, 226 Ga. App. 543 (1) (487 SE2d 112) (1997); *Dept. of Human Resources v. Money*, 222 Ga. App. 149 (1) (473 SE2d 200) (1996). Consequently, it does not expand the State's exposure for such federal claims beyond that expressly provided by the legislature in OCGA § 9-3-33.

3. In the recent case of *Norris v. Georgia Dept. of Transp.*, 268 Ga. 192 (___ SE2d ___) (1997), a majority of this Court held that the GTCA's requirement of ante litem notice of claim under OCGA § 50-21-26 is satisfied upon mailing of the notice in the manner specified in OCGA § 50-21-26 (a) (2). Accordingly, Doe's mailing of ante litem notices to DOC and to the Department of Administrative Services, by certified mail, return receipt requested, on June 24, 1993, was within the statutory time requirements for providing notice. Therefore, the trial court's determination to dismiss Doe's state law claims for failure to comply with OCGA § 50-21-26 cannot stand.

*Judgment affirmed in part and reversed in part. All the Justices concur.*

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[3] OCGA § 50-21-27 (b) provides, "For tort claims and causes of action which accrued between January 1, 1991, and July 1, 1992, any tort action brought pursuant to this article is forever barred unless it is commenced within two years after July 1, 1992."

**Court of Appeals**
**of the State of Georgia**

**ATLANTA, Feb. 5, 1997**

*The Honorable Court of Appeals met pursuant to adjournment.*

*The following order was passed:*

**A96A2106. DOE V. GEORGIA DEPARTMENT OF CORRECTIONS.**

Appellant Jane Doe No. 102 brought this action under the Georgia Tort Claims Act, OCGA § 50-21-20 et seq., claiming personal injuries arising out of the alleged mistreatment of inmates at the State Women's Prison at Hardwick in Baldwin County, Georgia. Among other grounds of appeal, she asserts that OCGA § 50-21-28, the portion of the 1992 Georgia Tort Claims Act which places venue in the state or superior court of the county where the loss occurred, is in direct conflict with the venue provisions of Ga. Const. Art. 6, Sec. 2, Par. 6, placing venue in the county where the defendant resides. The Supreme Court has exclusive appellate jurisdiction of such an issue. Ga. Const. Art. 6, Sec. 6, Par. 2 (1). *Beauchamp v. Knight*, 261 Ga. 608, 609-610 (409 SE2d 208) (1991), cited by Doe, is inapposite because that decision involved the Supreme Court's *general* equity jurisdiction, Ga. Const. Art. 6, Sec. 6, Par. 3 (2), not its *exclusive* jurisdiction to rule on the constitutionality of statutes.

The question was properly raised and preserved in the trial court, to the extent that Doe could do so, which is a prerequisite to consideration of such an issue on appeal. *Hardison v. Haslam*, 250 Ga. 59, 61 (3) (295 SE2d

830) (1982); 68, 69 (172 SE2d 411) (1970). Doe did everything she could to obtain a ruling on the question of venue even before it was raised by the Department's motion. She filed three separate pleadings on the issue of venue, including two briefs addressing her constitutional claims. In those pleadings, Doe has shown the challenged part of the statute with fair precision, she has shown the provision of the Constitution which she claims is violated by the statute, and she has shown how the statute violates the constitutional provision, thus fulfilling the requirements of *Blackston v. Dept. of Natural Resources*, 255 Ga. 15, 18 (334 SE2d 679) (1985).

This case does not appear to fall within any of the grounds for jurisdiction in the Court of Appeals as enumerated in *Atlanta Independent School System v. Lane*, 266 Ga. 657-658 (1) (469 SE2d 22) (1996). The Fulton County trial court's preprinted form order transferring the case, and the Baldwin County trial court's order adopting the earlier order, necessarily found OCGA § 50-21-28 constitutional, although they did not expressly so state. This is not a case in which the trial court did not "distinctly pass" upon an issue of constitutionality because it based its decision upon alternative grounds and thus found it unnecessary to reach the constitutional question. See, e.g., *Georgia Board of Dentistry v. Pence*, 223 Ga. App. 603, 604 (1) ( SE2d ) (1996). Nor is this a case in which the constitutional issue became moot. See *In re I.B.*, 219 Ga. App. 268, 269 (464 SE2d 865) (1995). Nor has the constitutional issue been previously resolved by the Supreme Court, as this is a case of first impression involving a newly enacted statute. Compare *Hoffman v. Georgia Dept. of Corrections*, 218 Ga. App. 363 (460 SE2d 882) (1995)

(decision prior to enactment of OCGA § 50-21-28). This is a significant and clearly presented constitutional conflict with a recently enacted statute, appropriate for resolution by the Supreme Court rather than this court.

Accordingly, it is hereby ordered that this case be TRANSFERRED to the Supreme Court.

*Court of Appeals of the State of Georgia*

*Clerk's Office, Atlanta FEB. 5, 1997*

*I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court hereto affixed the day and year last above written.*

*/s/ Illegible*
*Clerk.*

IN THE STATE COURT OF BALDWIN COUNTY

STATE OF GEORGIA

| | | |
|---|---|---|
| JANE DOE #102, | * | |
| | * | |
| Plaintiff, | * | CIVIL ACTION NO. |
| vs. | * | 96CV1607-ST |
| | * | |
| GEORGIA DEPARTMENT OF CORRECTIONS, | * | |
| | * | |
| Defendant. | * | |

**ORDER**

(Filed May 6, 1996)

1. This complaint was originally filed in the State Court of Fulton County on June 27, 1994. On July 25, 1994, Defendant filed an answer alleging, *inter alia*, that venue was improper in Fulton County. Concurrently with its answer, Defendant filed a Motion to Dismiss, or in the alternative, to transfer the case to the State Court of Baldwin County. On December 5, 1994, Fulton State Court Judge A. L. Thompson entered an order stating that, upon consideration of Defendant's Motion to Dismiss, it was denied and that the case be transferred to the State Court of Baldwin County. Whenever the court in which an action is pending is alleged to lack venue, the Uniform Transfer Rules become applicable. Rule T-4 says in essence that when a party makes a motion to dismiss, or any other motion or defense, on the basis that the court in which the case is pending is an improper venue, *such a motion shall be treated as a motion to transfer* pursuant to these rules. Rule 19.1, Uniform Superior Court Rules (applicable as well to State Court), provides that any

interlocutory or other order entered in the action prior to its transfer, upon motion of any party, shall be reviewed, and thereafter reissued or vacated by the transferee court. On February 19, 1996, Defendant filed a new Motion to Dismiss in which it moved this court to review the order entered on December 5, 1994. Having reviewed said order and having considered the attendant pleadings and rules, this court finds that the order entered by the State Court of Fulton County was not a ruling on the merits of the motion to dismiss but simply an application of the Uniform Transfer Rules. To the extent that said order implies that it is a ruling on the merits of Defendant's Motion to Dismiss, it is hereby vacated. To the extent that it acts as an order transferring the case to the proper venue, it is sustained.

2. Count Three of Plaintiff's complaint alleges violations of her rights under 42 U.S.C. § 1983. Defendant's Motion to Dismiss asserts that Plaintiff's § 1983 claims are barred by the statute of limitations and relies on ***Giles v. Garwood,*** 853 F.2d 876 (11th Cir. 1988) as authority. Plaintiff's complaint alleges that the injuries to Plaintiff occurred on or about February 26, 1991, and on or about October 2, 1991. The complaint was filed June 27, 1994. Pursuant to ***Giles, supra,*** the applicable statute of limitations for injuries to the person for § 1983 cases brought in Georgia courts shall be O.C.G.A. § 9-3-33 which provides that actions for injuries to the person shall be brought within two years after the right of action accrues. Plaintiff asserts that the provisions of O.C.G.A. § 50-21-27 extend the applicable period of limitations for § 1983 claims and that, accordingly, Plaintiff had two years from July 1, 1992, in which to file her complaint. This court disagrees.

Clearly the § 1983 claim in this case was not brought within two years of the alleged injuries. Count Three of the complaint is dismissed.

3. Because of the ruling in Part 2 the court deems it unnecessary to consider the issue of whether Defendant Department of Corrections is a person within the meaning of 42 U.S.C. § 1983.

4. Defendant asserts that Plaintiff's state law claims are barred by Plaintiff's failure to comply with the *ante litem* notice requirement under the Georgia Tort Claims Act, O.C.G.A. § 50-21-27, and relies on ***Hardy v. Candler County,*** et al., 214 Ga. App. 627 (1994). Plaintiff alleges she presented notice to the Department of Corrections and the Department of Administrative Services within 12 months after July 1, 1992, and therefore complied with the statute. In her Notice of Filing, filed August 3, 1994, Plaintiff shows she sent a Notice of Claim to both those agencies by certified mail, return receipt requested, on June 24, 1993. She further shows that the notice to Defendant was received on June 25, 1993, and that the notice to the DOAS was received on July 1, 1993. The notice provisions are explicit in requiring that the primary agency of the state to be presented with notice of a claim under the TCA, either by personal service with a receipt, or certified mail, return receipt requested, is the Department of Administrative Services. Notice to the agency or entity alleged to be responsible for the injury shall be served secondarily either in person or by first class mail with no receipt being required. This court follows the rationale adopted in ***Hardy*** and finds that the notice had to be received by the Department of Administrative Services on or before June 30, 1993, to be timely. Plaintiff has not

complied with the Georgia Tort Claims Act and her complaint is dismissed.

SO ORDERED this 6th day of May, 1996.

/s/ T. Dorsey Yawn
T. Dorsey Yawn, Judge

**IN THE STATE COURT OF FULTON COUNTY**
**STATE OF GEORGIA**

Jane Doe #102

Plaintiff,

v.

Civil Action File
No. 94VS8777OH

Georgia Department of
Corrections

Defendant.

**ORDER**

(Filed Dec. 7, 1994)

Upon consideration of Defendant's Motion to Dismiss, IT IS ORDERED that Defendant's Motion be denied and that the above styled action be transferred to the State Court of Baldwin County.

SO ORDERED this 5 day of December, 1994.

/s/ A. L. Thompson
JUDGE A. L. THOMPSON
FULTON COUNTY
STATE COURT

**EXCERPT FROM BRIEF OF APPELLANT, FILED BY PETITIONER ON FEBRUARY 27, 1997, IN THE SUPREME COURT OF GEORGIA, PP. 24-29 (JANE DOE #102 V. GEORGIA DEPARTMENT OF CORRECTIONS, CASE NO. S97A0739):**

III. THE TRIAL COURT ERRED IN REFUSING TO APPLY THE EXTENDED LIMITATIONS PERIOD OF THE TORT CLAIMS ACT TO MS. DOE'S CAUSE OF ACTION UNDER 42 U.S.C. § 1983

Ignoring an express provision of the Tort Claims Act, the trial court erroneously dismissed Ms. Doe's cause of action under 42 U.S.C. § 1983 on statute of limitations grounds. Ms. Doe filed her complaint under the TCA on June 27, 1994. (R. 9). Her cause of action under § 1983, like her causes of action for common law torts and Georgia constitutional torts, accrued during calendar year 1991. (R. 9).

While the two-year limitations period of O.C.G.A. § 9-3-33 would normally apply to these claims, the TCA expressly extends the limitations period for all "tort claims and causes of action" accruing in 1991. O.C.G.A. § 50-21-27(b) provides:

> For tort claims and causes of action which accrued between January 1, 1991 and July 1, 1992, any tort action brought pursuant to this article is forever barred unless it is commenced within two years after July 1, 1992.

O.C.G.A. § 50-21-27(b). Ms. Doe thus timely filed her § 1983 claim under the TCA, along with her common law tort and Georgia constitutional tort claims, on June 27, 1994, "within two years after July 1, 1992." *Id.*

Ms. Doe's § 1983 claim is indisputably a "tort claim[ ] and cause[ ] of action." *Id.*; *see Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) (Section 1983 creates "a species of tort liability"); *Wilson v. Garcia*, 471 U.S. 261, 277 (1985) ("The atrocities that concerned Congress in 1871 plainly sounded in tort. Relying on this premise we have found tort analogies compelling in establishing the elements of a cause of action under § 1983"); *see Monell v. Department of Social Servs.*, 436 U.S. 658, 692 (1978) ("[T]he fact that Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach when such causation was absent."); *Monroe v. Pape*, 365 U.S. 167, 187 (1961) ("[Section 1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions"), *overruled on other grounds, Monell*, 436 U.S. 658.[1] Thus, by its express terms, the extended limitations period of § 50-21-27(b) applies to Ms. Doe's § 1983 claim. Nevertheless, the trial court dismissed this claim as untimely under O.C.G.A. § 9-3-33. *See* (R. 227-28) (refusing to apply § 50-21-27(b)).

The United States Supreme Court has specifically held that state laws governing the tolling of statutes of limitations must be followed in § 1983 actions unless they

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[1] At the time the TCA was enacted, it was well-settled that § 1983 claims could be brought in Georgia courts. *Davis v. City of Roswell*, 250 Ga. 8 (1982); *City of Cave Spring v. Mason*, 252 Ga. 3 (1984); *Poss v. Moreland*, 253 Ga. 730, *cert. dismissed*, 474 U.S. 807 (1985); *City of Athens v. McGahee*, 178 Ga. App. 76 (1986); *Evans v. City of Atlanta*, 189 Ga. App. 566 (1988); *Evans v. Green*, 194 Ga. App. 394 (1990).

are inconsistent with federal law. *Chardon v. Fumero Soto*, 462 U.S. 650 (1983) (applying Puerto Rico tolling statute to § 1983 action); *Board of Regents v. Tomanio*, 446 U.S. 478, 485 (1980) (applying New York tolling statute to § 1983 action) ("[B]y its terms, [42 U.S.C. § 1988] authorizes federal courts to disregard an otherwise applicable state rule of law only if the state law is 'inconsistent with the Constitution and laws of the United States.' ") (*quoting* 42 U.S.C. § 1988).[2] In explaining that state tolling statutes apply to § 1983 actions along with state statutes of limitation, the Supreme Court has stated:

> "Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in

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[2] 42 U.S.C. § 1988 provides that the jurisdiction of the district courts under § 1983 (and certain other statutes) "shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . . " 42 U.S.C. § 1988(a).

> prohibiting the persecution of stale ones. In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, **and exceptions thereto**, on the prosecution of a closely analogous claim."

*Tomanio*, 446 U.S. at 485-86 (*quoting Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975)) (emphasis supplied). Thus, when courts "borrow[ ] a state period of limitation for application to a federal cause of action," such as the borrowing of O.C.G.A. § 9-3-33 for application to § 1983 actions, they also borrow the "exceptions thereto," including tolling statutes such as O.C.G.A. § 50-21-27(b). *Id.* The trial court erroneously applied § 9-3-33 to Ms. Doe's § 1983 claim without applying § 50-21-27(b), an "exception[ ] thereto." *Id.*

O.C.G.A. § 50-21-27(b) prescribes an expanded period of time for Georgia citizens to file tort claims and other causes of action under the TCA. The statute reflects Georgia's "value judgment concerning the point at which" such claims should be filed and "the State's wisdom" with respect to the application of statutes of limitation to such claims. *Id.* Pursuant to 42 U.S.C. § 1988 and the Supreme Court authority cited above, *§ 50-21-27(b) must be applied to Ms. Doe's § 1983 cause of action unless it is inconsistent with federal law. See Tomanio*, 446 U.S. at 484 (In § 1983 actions, state statutes of limitation and tolling rules are in most cases "binding rules of law").

Section 50-21-27(b) is, like the statute considered in *Chardon*, entirely consistent with federal law and the policies underlying § 1983. *See Chardon*, 462 U.S. at 657 ("no federal policy – deterrence, compensation, uniformity, or federalism – was offended by the application of state tolling rules") ("In light of Congress' willingness to rely on state statutes of limitations in civil rights actions, we specifically rejected the argument that the federal interest in uniformity justified displacement of state tolling rules.") (footnote omitted). "The policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." *Robertson v. Wegmann*, 436 U.S. 584, 590-91 (1978); *see Carey v. Piphus*, 435 U.S. 247, 254-57 (1978) (basic purpose of § 1983 damage awards is "to compensate persons for injuries caused by the deprivation of constitutional rights"). Section 50-21-27(b), which reflects Georgia's judgment that persons suffering violations of their rights during a specific time period should be provided additional time to file claims, directly promotes the federal policies of compensation for injuries and deterrence of deprivations of federal rights. The statute is thus not in any manner inconsistent with federal law and must be applied in this action.

**EXCERPT FROM APPELLANT'S ENUMERATION OF ERRORS, FILED BY PETITIONER ON FEBRUARY 27, 1997, IN THE SUPREME COURT OF GEORGIA, P. 1 (JANE DOE #102 V. GEORGIA DEPARTMENT OF CORRECTIONS, CASE NO. S97A0739):**

## ENUMERATION OF ERRORS

. . . .

3. The trial court erred in refusing to apply the extended limitations period of the Georgia Tort Claims Act, O.C.G.A. § 50-21-27(b), to appellant's cause of action under 42 U.S.C. § 1983.

**EXCERPT FROM BRIEF OF APPELLANT, FILED BY PETITIONER ON JULY 3, 1996, IN THE GEORGIA COURT OF APPEALS, PP. 16-23 (JANE DOE #102 V. GEORGIA DEPARTMENT OF CORRECTIONS, CASE NO. A96A2106):**

II. THE TRIAL COURT ERRONEOUSLY EXCLUDED MS. DOE'S § 1983 CAUSE OF ACTION FROM THE EXTENDED TCA LIMITATIONS PERIOD (O.C.G.A. § 50-21-27(b))

Ms. Doe filed this action under the Georgia Tort Claims Act on June 27, 1994. Her causes of action for constitutional and common law torts accrued during calendar year 1991. The Tort Claims Act extends the two-year limitations period otherwise applicable to torts producing personal injuries[3] by providing, at O.C.G.A. § 50-21-27(b):

> For tort claims **and** causes of action which accrued between January 1, 1991 and July 1, 1992, **any tort action brought pursuant to this article is forever barred unless it is commenced within two years after July 1, 1992.**

(Emphasis supplied).

Ms. Doe's complaint, filed on June 27, 1994, was filed "within two years after July 1, 1992" and is incontestably timely under § 50-21-27(b). *See* Charles M. Richards and Susan L. Levy, "A Practitioner's View of the Georgia Tort Claims Act," 30 Ga.St.B.J. 24, 27 (Fall 1993). Ms. Doe's § 1983 claim indisputably sounds in tort.[4] Nevertheless,

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[3] O.C.G.A. § 9-3-33 (1982).

[4] The liability imposed by § 1983 has been universally recognized as a species of tort. *Monroe v. Pape*, 365 U.S. 167, 187

the trial court declined to apply the extension of the limitations period codified at § 50-21-27(b) of the TCA and dismissed Ms. Doe's § 1983 cause of action as untimely under O.C.G.A. § 9-3-33.

The United States Supreme Court has specifically held that state laws governing the tolling of statutes of limitations must be followed in § 1983 actions unless they are inconsistent with federal law. *Chardon v. Fumer Soto*, 462 U.S. 650 (1983) (applying Puerto Rico tolling statute to § 1983 action); *Board of Regents v. Tomanio*, 446 U.S. 478, 485 (1980) (applying New York tolling statute to § 1983 action) ("[B]y its terms, [42 U.S.C. § 1988] authorizes

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(1961) ("[§ 1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions"), *overruled on other grounds, Monell v. Department of Social Servs.*, 436 U.S. 658 (1978); *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) (§ 1983 creates "a species of tort liability"); *Monell v. Department of Social Servs.*, 436 U.S. 658, 692 (1978) ("[T]he fact that Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach when such causation was absent."); *Wilson v. Garcia*, 471 U.S. 261, 277 (1985) ("The atrocities that concerned Congress in 1871 plainly sounded in tort. Relying on this premise we have found tort analogies compelling in establishing the elements of a cause of action under § 1983").

At the time of the TCA's enactment, it was well-settled that § 1983 tort claims could be brought and were being brought in the courts of the State of Georgia. *Davis v. City of Roswell*, 250 Ga. 8, 295 S.E.2d 317 (1982); *City of Cave Spring v. Mason*, 252 Ga. 3, 310 S.E.2d 892 (1984); *Poss v. Moreland*, 253 Ga. 730, 324 S.E.2d 456, *cert. denied*, 474 U.S. 807 (1985); *City of Athens v. McGahee*, 178 Ga. App. 76, 341 S.E.2d 855, *cert. denied* (May 13, 1986); *Evans v. City of Atlanta*, 189 Ga. App. 566, 377 S.E.2d 31 (1988); *Evans v. Green*, 194 Ga. App. 394, 391 S.E.2d 11 (1990).

federal courts to disregard an otherwise applicable state rule of law only if the state law is 'inconsistent with the Constitution and laws of the United States.' ") (*quoting* 42 U.S.C. § 1988). In explaining that state tolling statutes apply to § 1983 actions along with state statutes of limitation, the Supreme Court has stated:

> "Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the persecution of stale ones. In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, **and exceptions thereto**, on the prosecution of a closely analogous claim."

*Tomanio*, 446 U.S. at 485-86 (*quoting Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975)) (emphasis supplied).

O.C.G.A. § 50-21-27 prescribes an expanded period of time for Georgia citizens to file TCA claims and related causes of action against state agencies. The statute reflects Georgia's "value judgment concerning the point at

which" such claims should be filed and "the State's wisdom" with respect to the application of statutes of limitation to such claims. Pursuant to 42 U.S.C. § 1988[5] and the Supreme Court authority cited above, O.C.G.A. § 50-21-27 must be applied to Ms. Doe's § 1983 cause of action unless it is inconsistent with federal law. *See Tomanio*, 446 U.S. at 484 (In § 1983 actions, state statutes of limitation and tolling rules are in most cases "binding rules of law").

O.C.G.A. § 50-21-27 is, like the statute considered in *Chardon*, entirely consistent with federal law and the policies underlying § 1983. *See Chardon*, 462 U.S. at 657 ("no federal policy – deterrence, compensation, uniformity, or federalism – was offended by the application of state tolling rules") ("In light of Congress' willingness to rely on state statutes of limitations in civil rights actions, we specifically rejected the argument that the federal interest in uniformity justified displacement of state tolling rules.") (footnote omitted). "The policies underlying

---

[5] 42 U.S.C. § 1988 provides that the jurisdiction of the district courts under § 1983 (and certain other statutes) "shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . . " 42 U.S.C. § 1988(a).

§ 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." *Robertson v. Wegmann*, 436 U.S. 584, 590-91 (1978); *see Carey v. Piphus*, 435 U.S. 247, 254-57 (1978) (basic purpose of § 1983 damage awards is "to compensate persons for injuries caused by the deprivation of constitutional rights"). O.C.G.A. § 50-21-27, which reflects Georgia's judgment that persons suffering violations of their rights during a specific time period should be provided additional time to file claims, directly promotes the federal policies of compensation for injuries and deterrence of deprivations of federal rights. The statute is thus not in any manner inconsistent with federal law and must be applied in this action.

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**EXCERPT FROM APPELLANT'S ENUMERATION OF ERRORS, FILED BY PETITIONER ON JULY 3, 1996, IN THE GEORGIA COURT OF APPEALS, P. 1 (JANE DOE #102 V. GEORGIA DEPARTMENT OF CORRECTIONS, CASE NO. A96A2106):**

. . . .

2. The trial court erred in refusing to apply the extended limitations period of the Georgia Tort Claims Act, O.C.G.A. § 50- 21-27(b), to plaintiff's cause of action under 42 U.S.C. § 1983.

. . . .

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**EXCERPT FROM PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS, FILED BY PETITIONER ON MARCH 5, 1996, IN THE STATE COURT OF BALDWIN COUNTY, GEORGIA, PP. 4-7 (JANE DOE #102 V. GEORGIA DEPARTMENT OF CORRECTIONS, C.A. FILE NO. 1607ST):**

## II. PLAINTIFF'S SUIT IS TIMELY

Plaintiff filed this action seeking recovery for constitutional and common law torts committed during calendar year 1991 within the statute of limitations established by the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 *et seq.* ("TCA"). Section 50-21-27(b) provides:

> For tort claims **and** causes of action which accrued between January 1, 1991 and July 2, 1992, any tort action brought pursuant to this article is forever barred unless it is commenced within two years after July 1, 1992. (Emphasis supplied).

Plaintiff's complaint was filed on June 27, 1994 – within two years after July 1, 1992. It is, therefore, timely under the special statute of limitations prescribed for tort claims and other causes of action in § 50-21-27(b). *See* Charles M. Richards and Susan L. Levy, "A Practitioner's View of the Georgia Tort Claims Act," 30 Ga.St.B.J. 24, 27 (Fall 1993) (article by two members of the State Law Department noting that for claims accruing between January 1, 1991, and June 30, 1992, "action [under TCA] must be commenced [on or before June 30, 1994]").

With regard to plaintiff's § 1983 claim, the United States Supreme Court has specifically held that state laws governing the tolling of statutes of limitations must be followed in § 1983 actions unless they are inconsistent

with federal law. *Chardon v. Fumer Soto*, 462 U.S. 650 (1983) (applying Puerto Rico tolling statute to § 1983 action); *Board of Regents v. Tomanio*, 446 U.S. 478, 485 (1980) (applying New York tolling statute to § 1983 action) ("[B]y its terms, [42 U.S.C. § 1988] authorizes federal courts to disregard an otherwise applicable state rule of law only if the state law is 'inconsistent with the Constitution and laws of the United States.' ") (*quoting* 42 U.S.C. § 1988). In explaining that state tolling statutes apply to § 1983 actions along with state statutes of limitation, the Supreme Court has stated:

> "Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the persecution of stale ones. In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim."

*Tomanio*, 446 U.S. at 485-86 (*quoting Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975)).

O.C.G.A. § 50-21-27 prescribes an expanded period for Georgia citizens to file TCA claims and related causes

of action against state agencies. The statute reflects Georgia's "value judgment concerning the point at which" such claims should be filed and "the State's wisdom" with respect to the application of statutes of limitation to such claims. Pursuant to 42 U.S.C. § 1988[6] and the Supreme Court authority cited above, O.C.G.A. § 50-21-27 must be applied in this § 1983 action unless it is inconsistent with federal law. *See Tomanio*, 446 U.S. at 484 (In § 1983 actions, state statutes of limitation and tolling rules are in most cases "binding rules of law").

O.C.G.A. § 50-21-27 is, like the statute considered in *Chardon*, entirely consistent with federal law and the policies underlying § 1983. *See Chardon*, 462 U.S. at 657 ("no federal policy – deterrence, compensation, uniformity, or federalism – was offended by the application of state tolling rules") ("In light of Congress' willingness to rely on state statutes of limitations in civil rights actions, we specifically rejected the argument that the federal interest in uniformity justified displacement of state tolling rules.") (footnote omitted). "The policies underlying

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[6] 42 U.S.C. § 1988 provides that the jurisdiction of the district courts under § 1983 (and certain other statutes) "shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . . " 42 U.S.C. § 1988.

§ 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." *Robertson v. Wegmann*, 436 U.S. 584, 590-91 (1978); *see Carey v. Piphus*, 435 U.S. 247, 254-57 (1978) (basic purpose of § 1983 damage awards is "to compensate persons for injuries caused by the deprivation of constitutional rights"). O.C.G.A. § 50-21-27, which reflects Georgia's judgment that persons suffering violations of their rights during a specific time period should be provided additional time to file claims, directly promotes the federal policies of compensation for injuries and deterrence of deprivations of federal rights. The statute is thus not in any manner inconsistent with federal law and must be applied in this action.

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**EXCERPT FROM PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS, FILED BY PETITIONER ON AUGUST 24, 1994, IN THE STATE COURT OF FULTON COUNTY, GEORGIA ,PP. 5-6 (C.A. FILE NO. 94-VS-0087770-H):**

## I. PLAINTIFF FILED HER CLAIMS WITHIN THE STATUTE OF LIMITATIONS

Plaintiff timely filed her Complaint within the statute of limitations established by the TCA. In asserting its statute of limitations defense, the DOC simply ignores the express terms of the TCA.

Plaintiff's claims in this action are brought pursuant to the Georgia Tort Claims Act. Complaint, p. 1. The torts committed by the DOC (violations of the Georgia and United States Constitutions and intentional infliction of emotional distress) occurred during calendar year 1991. *Id. The TCA expressly provides that for torts committed in 1991, the statute of limitations runs for two years from July 1, 1992, i.e., until July 1, 1994.* Specifically, O.C.G.A. § 50-21-27(b) provides: "For tort claims and causes of action which accrued between January 1, 1991, and July 1, 1992, any tort action brought pursuant to this article is forever barred unless it is commenced within two years after July 1, 1992." O.C.G.A. § 50-21-27(b); *see also* Charles Richards and Susan Levy, "A Practitioner's View of the Georgia Tort Claims Act," 30 Ga.St.B.J. 24, 27 (article by two members of the Attorney General's Office noting that for claims accruing between January 1, 1991, and June 30, 1992, "action [under TCA] must be commenced on or before June 30, 1994"). Plaintiff timely filed her Complaint on June 27, 1994.

[logo]

STATE OF GEORGIA

OFFICE OF THE GOVERNOR

ATLANTA 30334

Zell Miller
GOVERNOR

Chuck Reece
DIRECTOR OF COMMUNICATIONS

PRESS ADVISORY

PRESS ADVISORY

For immediate release
January 21, 1993

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Governor Orders Relocation of Women's Prison

ATLANTA – Governor Zell Miller Today ordered the Department of Corrections (DOC) to reassign all female inmates at the Georgia Women's Correctional Institution in Hardwick to a facility in Atlanta, so the DOC can more closely manage the facility and so inmates can receive more medical and mental health treatment, security and family support.

"Moving the State's largest women's correctional facility to Atlanta should enable the Department to keep a tighter reign on the prison, because it will be close to headquarters," Governor Miller said. "I expect Corrections to run a squared-away, well-run institution because we cannot tolerate the kind of abuses that occurred at Hardwick."

At the Governor's direction, the DOC will transfer almost 700 men from Atlanta's Metro Correctional Institution to other men's facilities, making Metro CI available for the female inmates by July 1. The women's prison at Hardwick will be converted to an institution focusing on mental health treatment and care for men. The Governor

emphasized that employees at both facilities will not lose their jobs, and they will not be transferred against their will.

Governor Miller said he believed DOC will more closely monitor activities at the women's institution, and better manage its staff, if the facility is moved to Atlanta.

Since March, the Georgia Bureau of Investigation and DOC have investigated allegations of sexual abuse of inmates at the women's prison in Hardwick, and 15 former staff members now face criminal prosecution. Fifteen others, against whom criminal action could not be taken, have resigned, been transferred or been fired. The investigation has covered 14 years of the Hardwick facility's history, and more than 120 women have filed affidavits claiming sexual abuse by staff, which is a felony in Georgia.

To date, the DOC has made sweeping changes in all areas of inmate life at the women's prison, including naming women to the positions of warden and deputy warden and making changes in security staff, medical staff, counseling teams and in medical and dental care and substance abuse treatment.

Teams of outside consultants and mental health specialists have been called in to work with the female inmate population.

Whitworth also has appointed a woman as deputy commissioner for female services, appointed a woman as the department's first director of psychiatric services, named a new medical director for the institution and appointed a special assistant commissioner to oversee

closure of the 1984 class-action lawsuit that was revived last March to include the allegations of sexual misconduct.

Importantly, because the largest percentage of female state prison inmates are from metro Atlanta and surrounding counties, the move to Atlanta will bring them closer to their families, from whom they may gain emotional and psychological support.

"This change signifies our commitment to doing everything in our power to make sure that while female offenders are being punished in Georgia, they have the very best treatment and security available," said Governor Miller. "This change will help decrease the likelihood that incidents of sexual abuse of female offenders will occur again."

Commissioner Whitworth said he is confident the change can be completed by July 1. He pledged to continue to work to bring about substantive change in female offender services.

"Bringing the women inmates up to the metro area is the right step at the right time," said Whitworth. "My entire staff has pledged to manage this latest change as efficiently and as professionally as possible so that it poses the minimum impact possible on our staffs, inmates and operations."

(2)

Supreme Court, U.S.
FILED
FEB 27 1998
CLERK

No. 97-1253

In The

# Supreme Court of the United States

October Term, 1997

JANE DOE #102,

*Petitioner,*

v.

GEORGIA DEPARTMENT OF CORRECTIONS,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Georgia**

## BRIEF OF RESPONDENT IN OPPOSITION

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the inquiry concerning the applicable statute of limitations is improper because the Georgia Department of Corrections is not a "person" within the meaning of 42 U.S.C. § 1983 pursuant to *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989).

2. Whether the Supreme Court of Georgia correctly upheld the trial court's dismissal of the Petitioner's federal civil rights claims pursuant to the State of Georgia's general statute of limitations for personal injury actions, O.C.G.A. § 9-3-33, as required by *Wilson v. Garcia*, 471 U.S. 261 (1985) and *Owens v. Okure*, 488 U.S. 235 (1989).

## TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTIONS PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iii

BRIEF FOR RESPONDENT IN OPPOSITION ..... 1

STATEMENT OF THE CASE ..... 1

A. Statement of Facts ..... 1

B. Proceedings Below ..... 1

REASONS FOR DENYING THE WRIT ..... 4

ARGUMENT ..... 5

CONCLUSION ..... 16

# TABLE OF AUTHORITIES

Page

CASES

*Battle v. Barts*, 211 Ga. App. 106 (438 S.E.2d 1985) (1993) ..... 3

*Board of Regents of the University of the State of New York v. Tomanio*, 446 U.S. 478 (1980) ..... 11

*Camps v. City of Winder*, 822 F.Supp. 724 (M.D. Ga. 1993) ..... 12

*Day v. Brown*, 207 Ga. App. 134 (427 S.E.2d 104) (1993) ..... 3

*Department of Human Resources v. Money*, 222 Ga. App. 149(1) (473 S.E.2d 200) (1996) ..... 4

*Dixon v. Chrans*, 986 F.2d 201 (7th Cir. 1993) ..... 14

*Giles v. Garwood*, 853 F.2d 876 (11th Cir. 1988) ..... 3

*Hardin v. Straub*, 490 U.S. 536 (1989) .....12, 13

*Hill v. Department of Corrections*, 513 So.2d 129 (1987) ..... 13

*Howard v. State of Georgia*, 226 Ga. App. 543(1) (487 SE2d 112) (1997) ..... 4

*Howlett v. Rose*, 496 U.S. 356 (1990) ..... 13

*Hughes v. Sheriff of Fall River County Jail*, 814 F.2d 532 (8th Cir. 1987) ..... 14

*Owens v. Okure*, 488 U.S. 235 (109 S.Ct. 573, 102 L.Ed.2d 594) (1989) ..... 3, 4, 6, 8, 10, 12

*Will v. Michigan Department of State Police*, 491 U.S. 58 (1989) .....5, 14

*Williams v. City of Atlanta*, 794 F.2d 624 (11th Cir. 1986) ..... 3

*Wilson v. Garcia*, 471 U.S. 261 (105 S.Ct. 1938, 85 L.Ed.2d 254) (1985) .....3, 8, 10, 12

## BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Georgia Department of Corrections, respectfully submits this Brief in Opposition to the Petition for Certiorari filed in the above-captioned case.

## STATEMENT OF THE CASE

### A. Statement of Facts

Petitioner's statement of facts will not assist this court. Petitioner has recited an inflammatory version of facts which are not relevant to the strictly legal/procedural question before this Court. Respondent submits their concise statement of facts and shows the following:

Petitioner's complaint filed on or about June 27, 1994 sought damages for alleged violations of her rights protected by common law, the Georgia Constitution, and the Constitution of the United States while in the custody of Respondent in 1991. Pet. App. A-3-4. The alleged torts and constitutional violations occurred while Petitioner was incarcerated at Georgia Women's Correctional Institution during 1991. Pet. App. A-3. Petitioner's claims under 42 U.S.C. § 1983 alleged violations of her rights under the Fourth, Eighth, Tenth, and Fourteenth Amendments to the United States Constitution. Pet. App. A-4.

### B. Proceedings Below

Petitioner filed a Complaint pursuant to the Georgia Tort Claims Act, O.C.G.A. § 50-21-20, in the State Court of Fulton County, State of Georgia, on June 27, 1994. Pet. App. 4B, 4a, 7a. Respondent filed a Motion to Dismiss

contending that venue was improper in Fulton County, that the civil action was barred by the applicable statute of limitations, that Petitioner had failed to comply with the *ante-litem* notice provision of the Georgia Tort Claims Act ("GTCA"), and that the Department of Corrections was not a "person" within the meaning of 42 U.S.C. § 1983. Pet. App. 1a. The State Court of Fulton County denied Respondent's Motion to Dismiss but granted the Motion to Transfer to the State Court of Baldwin County. Pet. App. 1a. Respondent then filed a proper Renewed Motion to Dismiss pursuant to the Georgia Uniform Transfer Rules in the State Court of Baldwin County noting that the State Court's Order transferring the matter to Baldwin County was silent on Respondent's specific assertions that all of Petitioner's claims, under both federal and state law, were barred by the applicable statute of limitations and that the Department of Corrections is not a "person" within the meaning of 42 U.S.C. § 1983. Pet. App. 1a, 7a-9a.

On May 6, 1996, the State Court of Baldwin County dismissed Count Three of Petitioner's Complaint alleging violations of her rights under 42 U.S.C. § 1983 based on the applicable two-year statute of limitations. Pet. App. 8a-9a. The court deemed it unnecessary to consider the issue of whether the Department of Corrections is a "person" within the meaning of 42 U.S.C. § 1983 based on the Court's ruling on the statute of limitations. Pet. App. 9a. The Court further held that the Petitioner had not complied with the Georgia Tort Claims and dismissed her Complaint. Pet. App. 9a-10a. Petitioner then appealed the Order to the Court of Appeals of the State of Georgia.

The Georgia Court of Appeals transferred Petitioner's Appeal to the Georgia Supreme Court. Pet. App. 6a. Respondent again contended that Petitioner's 42 U.S.C. § 1983 claims were barred by the two-year statute of limitations under O.C.G.A. § 9-3-33 and that the Georgia Department of Corrections is not a "person" within the meaning of § 1983. The Georgia Supreme Court held that Petitioner had timely complied with the *ante litem* notice provisions of the Georgia Tort Claims Act and reversed the trial court's dismissal of the Complaint. Pet. App. 3a. However, the Georgia Supreme Court, affirmed the dismissal of Petitioner's § 1983 claims on statute of limitations grounds pursuant to O.C.G.A. § 9-3-33 and held the following:

> The Baldwin County Court correctly dismissed the federal civil rights claims as untimely. The two-year statute of limitation in O.C.G.A. § 9-3-33 governs claims brought under 42 U.S.C. § 1983 because such claims are most accurately characterized as personal injury actions. *Battle v. Barts*, 211 Ga. App. 106, 107 (438 S.E.2d 1985) (1993); *Day v. Brown*, 207 Ga. App. 134 (427 S.E.2d 104) (1993). *See also Owens v. Okure*, 488 U.S. 235 (109 S.Ct. 573, 102 L.Ed.2d 594) (1989); *Wilson v. Garcia*, 471 U.S. 261 (105 S.Ct. 1938, 85 L.Ed.2d 254) (1985); *Giles v. Garwood*, 853 F.2d 876 (11th Cir. 1988); *Williams v. City of Atlanta*, 794 F.2d 624 (11th Cir. 1986). Contrary to Doe's assertion, this is not changed by O.C.G.A. § 50-21-27(b), as its terms do not call for an extension of the period for filing § 1983 claims. The GTCA represents a waiver of the State's sovereign immunity, limited in extent and manner. O.C.G.A. § 50-21-23(a) and (b). *See also* O.C.G.A. §§ 50-21-21, 50-21-25(a). As such, its

> provisions should be narrowly construed. *Howard v. State of Georgia*, 226 Ga. App. 543(1) (487 S.E.2d 112) (1997); *Department of Human Resources v. Money*, 222 Ga. App. 149(1) (473 S.E.2d 200) (1996). Consequently, it does not expand the State's exposure for such federal claims beyond that expressly provided by the legislature in O.C.G.A. § 9-3-33.

Petitioner has now filed a Petition for Writ of Certiorari to review the judgment of the Supreme Court of Georgia.

## REASONS FOR DENYING THE WRIT

The Petition does not warrant this Court's consideration. Supreme Court Rule 10 makes it clear that review on a writ of certiorari is not a matter of right but of judicial discretion and that a petition for a writ of certiorari will be granted only for compelling reasons. Supreme Court Rule 10. There are no compelling reasons to grant the within Petition. Rather, the law dictates its denial.

This Court has made it clear in the decisions of *Wilson v. Garcia*, 471 U.S. 261 (1985) and *Owens v. Okure*, 488 U.S. 235 (1989) that courts considering § 1983 claims should borrow the State's general or residual personal injury statute of limitations. This Court in *Owens* held that "every State has one general or residual statute of limitations governing personal injury actions" which is "easily identifiable." *Owens*, 488 U.S. at 245-247. This Court in *Owens* also stated that "potential § 1983 plaintiffs and defendants therefore can readily ascertain, with

little risk of confusion or unpredictability, the applicable limitations period in advance of filing an action. *Id.* at 248. As O.C.G.A. § 9-3-33 is clearly the State of Georgia's general personal injury statute of limitations, this Honorable Court must deny Petitioner's Writ pursuant to the aforementioned case law.

Moreover, Petitioner's argument completely ignores the threshold question that Respondent, Georgia Department of Corrections, is not a "person" within the meaning of § 1983 pursuant to *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). Thus, 42 U.S.C. § 1983 does not even apply to this Respondent and any inquiry concerning the statute of limitations is therefore completely irrelevant.

## ARGUMENT

1. The Georgia Department of Corrections has argued at each level of the proceedings that it is not a "person" within the meaning of § 1983 pursuant to *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). The Georgia Department of Corrections, the only party the Petitioner is proceeding against in this action, is not a proper party under 42 U.S.C. § 1983. Therefore, Petitioner sued the wrong party with respect to 42 U.S.C. § 1983 claims and is out of Court on these claims based upon her own error. Since the Department of Corrections is not a "person" subject to suit under 42 U.S.C. § 1983 and no other "person" is named against whom such claims can proceed, this Court could deny the Writ of Certiorari on this basis alone and proceed no further.

2. This Court's decisions in *Wilson v. Garcia*, 471 U.S. 261 (1985) and *Owens v. Okure*, 488 U.S. 235 (1989) are directly on point, controlling, and have conclusively determined the statute of limitations issue against Petitioner.

In *Wilson*, this Court granted certiorari to determine "the most appropriate state statute of limitations" for actions filed under 42 U.S.C. § 1983. *Wilson*, 471 U.S. at 261, 262. The District Court in this case concluded that § 1983 actions are best characterized as actions based on statute but that there was no specific New Mexico statute of limitations governing such claims. *Id.* at 263. The District Court held that § 37-1-4, the residual four-year statute, applied to § 1983 actions. *Id.* at 263. New Mexico had a two-year statute of limitations as contained in § 41-4-15(a) of the New Mexico Tort Claims Act, a statute with a three-year limitation period in § 37-1-8 for actions for an injury to the person or reputation of any person, and § 37-1-4 which provided a four-year limitation period for "all other actions not herein otherwise provided for." *Id.* at 263. The Court of Appeals for the Tenth Circuit held that the appropriate statute of limitations for § 1983 actions was the three-year statute applicable to personal injury actions. *Id.* at 265.

The United States Supreme Court granted certiorari in *Wilson* based on the "conflict, confusion, and uncertainty concerning the appropriate statute of limitations to apply to this most important, and ubiquitous civil rights statute." *Id.* at 266. The Court held that:

> We conclude that the statute (42 U.S.C. § 1988) is fairly construed as a directive to select, in each

> State, the one most appropriate statute of limitations for all § 1983 claims. The federal interests in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach.

*Id.* at 275. The Court noted that "almost every § 1983 claim can be favorably analogized to more than one of the ancient common-law forms of action, each of which may be governed by a different statute of limitations." *Id.* at 272, 273.

This Court held that the Court of Appeals correctly applied the three-year statute of limitations governing actions "for an injury to the person or reputation of any person" on the basis that "§ 1983 claims are best characterized as personal injury actions." *Id.* at 280. This Court stated that:

> The characterization of all § 1983 actions as involving claims for personal injuries minimizes the risk that the choice of a state statute of limitations would not fairly serve the federal interests vindicated by § 1983. General personal injury actions, sounding in tort, constitute a major part of the total volume of civil litigation in the state courts today, and probably did so in 1871 when § 1983 was enacted. It is most unlikely that the period of limitations applicable to such claims ever was, or ever would be, fixed in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect.

*Id.* at 279.

In the present case, Petitioner is arguing that O.C.G.A. § 50-21-27(b) of the Georgia Tort Claims Act is

applicable despite the presence of O.C.G.A. § 9-3-33, Georgia's general statute of limitations for personal injury. Similarly, in *Wilson, supra,* this Court held that the three-year statute of limitations for personal injury actions was the appropriate statute despite the presence of a two-year statute of limitations contained in § 41-4-15(a) of the New Mexico Tort Claims Act *and* a New Mexico State Police officer as a defendant. There is simply no reason for this Court to depart from this precedent in the within case.

In *Owens v. Okure,* 488 U.S. 235 (1989), this Court again addressed the issue of statute of limitations in section 1983 claims and again held adversely to Petitioner's position. The issue in *Owens* involved the identification of the correct limitations period for a § 1983 action where a state has one or more statutes of limitations for personal injury actions. *Owens,* 488 U.S. at 236. The Court stated that:

> In *Wilson,* we sought to end this 'conflict, confusion and uncertainty.' 471 U.S. at 266, 105 S.Ct. at 1941. Recognizing the problems inherent in the case-by-case approach, we determined that 42 U.S.C. § 1988 requires courts to borrow and apply to all § 1983 claims the one most analogous state statute of limitations. *Ibid. See id.,* at 275, 105 S.Ct. at 1946 ("[f]ederal interests in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach"); *see also id.,* at 272, 105 S.Ct. at 1945 ("[A] simple, broad characterization of all § 1983 claims best fits the statute's remedial purpose"). We concluded, based upon the legislative history of § 1983 and the wide array of claims now

> embraced by that provision, that § 1983 'confer[s] a general remedy for injuries to personal rights.' *Id.* at 278, 105 S.Ct. at 1948. Because '§ 1983 claims are best characterized as personal injury actions,' we held that a State's personal injury statute of limitations should be applied to all § 1983 claims. *Id.* at 280, 105 S.Ct. at 1949.

*Id.* at 240-241.

This Court stated in *Owens* that "our task today is to provide courts with a rule for determining the appropriate personal injury limitation statute that can be applied with ease and predictability in all fifty states." *Id.* at 243. This Court further noted that "every state has one general or residual statute of limitations governing personal injury actions" and definitively held that:

> Where state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the *general or residual* statute for personal injury actions.

*Id.* at 250 (emphasis supplied). This Court further stated that:

> *Our decision in Wilson promised an end to the confusion over what statute of limitations to apply to § 1983 actions; with today's decision, we hope to fulfill Wilson's promise.*

*Id.* at 251 (emphasis supplied).

Accordingly, the Supreme Court of Georgia was clearly correct in holding that the two-year statute of limitations in O.C.G.A. § 9-3-33 governs claims brought under 42 U.S.C. § 1983 and does not violate any federal law. The plain purpose of the aforementioned case law as

to "end the confusion over what statute of limitations to apply to § 1983 actions." *Owens*, 488 U.S. at 251. In fact, application of the limitations period in the Georgia Tort Claims Act would affect the very result this Court expressly intended to avoid. The Georgia Tort Claims Act applies *only* to state officials and does not apply to county, city or other local government officials. Therefore, applying O.C.G.A. § 50-21-27(b) to 42 U.S.C. § 1983 claims would result in an extended limitations period against state officials *only* and *only* for claims arising between January 1, 1991 and July 1, 1992. *See* O.C.G.A. § 50-21-27(b). Thus, any claims against local government officials and claims against state officials which arose outside of this limited period, would be subject to a two-year statute of limitations, a period different from the two-and-one-half-year extended limitations period under the Act. Thus, the very confusion this court expressly intended to resolve in *Wilson* and *Owens*, would be revisited upon Georgia litigants and would actually work a form of reverse discrimination upon state officials.

The reason underlying the extension of the two-year statute of limitations period under the Georgia Tort Claims Act is equally inapposite to Petitioner's cause. The two-year statute of limitations was extended for tort claims arising between January 1, 1991 and July 1, 1992 under the Georgia Tort Claims Act based upon legislative delay. In 1991, the voters of the State of Georgia ratified a Constitutional Amendment re-establishing the State's sovereign immunity. *See* Ga. Const. 1983, Art. I, Sec. II, Para. IX(e). This Amendment became effective on January 1, 1991 and authorized Georgia's General Assembly to enact a state tort claims act. Although the Legislature

failed to pass such an act during the 1991 legislative session, the Georgia Tort Claims Act was finally passed during the 1992 session. Simply because Petitioner may reap the benefit of the legislative delay with respect to her state tort claims, she is not thereby also entitled to any extension of the limitations period with respect to her federal claim.

Petitioner's argument is even more ridiculous in light of the fact that the Georgia Department of Corrections, the only named Defendant/Respondent in Ms. Doe's action, is not even a proper "person" within the meaning of 42 U.S.C. § 1983. Any analysis concerning the statute of limitations is therefore completely irrelevant in the within case. Moreover, Petitioner's thinly veiled attempt to circumvent the two-year statute of limitations was not tolerated in the Georgia courts and should not be countenanced by this Court. Petitioner always had a right to file her 42 U.S.C. § 1983 claim against a proper defendant in a timely manner. Her claim is barred by her own failure to do so and not by any act of the Georgia Supreme Court.

The cases cited by Petitioner are not applicable to the within case and even provide support for denying her Petition. In *Board of Regents of the University of the State of New York v. Tomanio*, 446 U.S. 478 (1980), the plaintiff brought a lawsuit pursuant to 42 U.S.C. § 1983 and the District Court held that a federal tolling rule should apply during pendency of the plaintiff's state court litigation. *Tomanio*, 446 U.S. at 482. The State of New York had a rule tolling the period of time in which to file an action while the plaintiff pursues a related but independent cause of action. *Id.* at 482, 483. This Court held that the

courts must apply the analogous New York statute of limitations and the New York rule for tolling that statute of limitations. *Id.* at 483. The Court noted that Congress did not establish a statute of limitations or body of tolling rules applicable to federal court actions under § 1983 and that the analogous statute of limitations and the coordinate tolling rules are binding rules of law in most cases unless they are "inconsistent" with federal law. *Id.* at 484, 485.

O.C.G.A. § 9-3-33 includes its own tolling provisions. *See* O.C.G.A. § 9-3-90 through § 9-3-98. In this regard see *Camps v. City of Winder,* 822 F.Supp. 724 (M.D. Ga. 1993) holding that the Georgia two-year statute of limitations period for personal injuries under O.C.G.A. § 9-3-33 applies to § 1983 claims and that state tolling provisions of § 9-3-90(a) apply to § 1983 claims as well. *Camps,* 822 F.Supp. at 729, citing *Wilson v. Garcia, supra.* There is no contention in the present case that the tolling provisions of § 9-3-33 do not apply. Pursuant to *Wilson* and *Owens,* § 9-3-33 must be applied and *Tomanio* does not provide any authority otherwise. Moreover, O.C.G.A. § 50-21-27(b) is *not* a tolling provision. It does not suspend the limitations period, but rather, extends it under limited circumstances. Therefore, Petitioner's insistence that this provision is a tolling statute, and that law pertaining tolling provisions applies herein, is totally unfounded.

The case of *Hardin v. Straub,* 490 U.S. 536 (1989) is equally inapplicable to this case. In *Hardin,* the Michigan Legislature had enacted tolling provisions tolling the onset of limitations periods for prisoners and others suffering from legal disabilities. *Hardin,* 490 U.S. at 540. The

Court held that "a state's decision to toll the statute of limitations during the inmate's disability does not frustrate § 1983's compensation goal." *Id.* at 543. The Court of Appeals for the Sixth Circuit had held that Michigan's tolling law was inconsistent with federal law and declined to apply it. *Id.* at 543. As stated previously, O.C.G.A. § 9-3-33 has its own coordinate tolling provisions and there is no challenge to these provisions from the Petitioner. There is no issue in this case of whether the Petitioner's lawsuit was tolled during her incarceration, which was repealed as a tolling provision under Georgia law many years ago.

In *Howlett v. Rose*, 496 U.S. 356 (1990), the isolated issue before this Court was "whether a state law defense of sovereign immunity is available to a school board otherwise subject to suit in a Florida court even though such a defense would not be available if the action had been brought in a federal forum." *Howlett*, 496 U.S. at 358. In *Howlett* the plaintiff brought a § 1983 claim in state court against the local school board and three school officials. *Id.* at 359. The court dismissed the complaint on the basis of a Florida Supreme Court decision, *Hill v. Department of Corrections*, 513 So.2d 129 (1987), holding that a Florida statute conferred blanket immunity on government entities from federal civil rights actions under § 1983. *Id.* at 364.

*Howlett* is distinguishable based on the fact that the defendants in that case were the local school board and three school officials, not state officials. In addition, *Howlett* actually supports Respondent's position by reinforcing the clear principle that the State and departments of the State are not "persons" within the meaning of § 1983 as

held in *Will, supra.* The Georgia Department of Corrections, as an arm of the State, is not a "person" and is not subject to suit under § 1983 in either federal or state court.

The case of *Hughes v. Sheriff of Fall River County Jail,* 814 F.2d 532 (8th Cir. 1987) is also readily distinguishable from the case at bar. In that case, South Dakota included a provision in its statute of limitations tolling provision stating that it was "inapplicable to federal civil rights claims." *Hughes,* 814 F.2d at 533. The Court noted that the State had "singled out federal claims subjecting them to more restrictive tolling provisions than those governing analogous state law claims" and held that this was "inconsistent with federal law." *Id.* at 535. In the present case, Petitioner does not argue that O.C.G.A. § 9-3-33 is inconsistent with federal law because its tolling provision includes any such provision. There is no challenge to the tolling provisions of O.C.G.A. § 9-3-33 and no evidence of any applicable tolling provision of this statute stating that it is "inapplicable to federal civil rights claims."

In *Dixon v. Chrans,* 986 F.2d 201 (7th Cir. 1993), the State of Illinois had a statute stating that the period for bringing a civil rights action against the Illinois Department of Corrections is not tolled for the time that the inmate bringing the action is in prison. *Dixon,* 986 F.2d at 202. Under state law, imprisonment was once considered a legal disability but that disability was removed for people in prison on criminal charges with respect to claims against the Illinois Department of Corrections or its employees. *Id.* at 202. The Court held that the State may not confer a tolling benefit and withhold it with

respect to claims brought against certain government officials when the result is to burden the federal cause of action. *Id.* at 205. The State of Georgia has no such tolling provision in O.C.G.A. § 9-3-33 and this is not even an issue in this case.

Petitioner's attachment of the Press Advisory on p. 29a is entirely inappropriate. The document was not a part of her Complaint, not properly part of the record on appeal and should not be included in this Court record either. There has been no finding either criminally or otherwise that the statements in the Press Advisory apply to Petitioner. In fact, the restraint procedure used by the mental health staff of the Department of Corrections has been conclusively established as constitutional in another case wherein the United States District Court for the Middle District of Georgia granted summary judgment to all the defendants on all of the plaintiff's claims. *Campbell v. Duncan,* Civil Action No. 5:94-CV-345-3. Nearly all of the other cases filed by individual "Jane Does" have been either dismissed on summary judgment or voluntarily dismissed by the plaintiff. *Jane Doe #28,* Civil Action No. 94-208-3-MAC (WDO) (MD Ga.) and *Jane Doe #45,* Civil Action No. 94-389-1-MAC (WLS) (MD Ga.), both dismissed on summary judgment; and *Jane Doe #90,* Civil Action No. 94A-90405-4 (Georgia State Court, DeKalb County), *Jane Doe #39,* Civil Action No. 93-405-1-MAC (WDO) (MD Ga.), and *McAteer,* Civil Action No. 94-CV-57-4-MAC (WDO) (MD Ga.), dismissed voluntarily by the plaintiffs.

The Petition for Writ of Certiorari in this case is contrary to the well established precedent of this Court. The Respondent is not a "person" within the meaning of

42 U.S.C. § 1983 and is not subject to Section 1983 liability as a matter of law. Similarly, it is well established that the two-year general statute of limitations in Georgia, found at O.C.G.A. § 9-3-33 which applies to all litigants in Georgia on tort claims is the proper statute of limitations in Petitioner's Section 1983 claim. It is essential for purposes of uniformity, predictability and clarity that O.C.G.A. § 9-3-33 applies, rather than the limited statute of limitations period found in the Georgia Tort Claims Act, O.C.G.A. § 50-21-27(b), which applies *only* to state officials, concerning *only* claims which arose between January, 1991 and July, 1992.

## CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny Petitioner's Writ of Certiorari.

This 27th day of February, 1998.

Respectfully submitted,

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No. 97-1253

In The

# Supreme Court of the United States

October Term, 1997

JANE DOE #102,

*Petitioner,*

v.

GEORGIA DEPARTMENT OF CORRECTIONS,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court Of Georgia**

## PETITIONER'S REPLY MEMORANDUM

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10 pp

TABLE OF CONTENTS

Page

ARGUMENT ..... 1

I. BECAUSE THE GEORGIA SUPREME COURT DID NOT PASS ON THE APPLICABILITY OF *WILL V. MICHIGAN DEPARTMENT OF STATE POLICE*, 491 U.S. 58 (1989), TO THIS ACTION, THIS COURT MAY NOT REVIEW THAT ISSUE ..... 1

II. THIS COURT SHOULD ALLOW THE GEORGIA COURTS TO PASS ON PETITIONER'S ARGUMENT THAT *WILL* DOES NOT PRECLUDE HER § 1983 CLAIM AGAINST RESPONDENT..... 3

III. RESPONDENT'S RELIANCE ON *WILSON V. GARCIA*, 471 U.S. 261 (1985), IS MISPLACED..... 5

## TABLE OF AUTHORITIES

Page

CASES

*Allen v. McCurry*, 449 U.S. 90 (1980) ..... 3

*Bailey v. Anderson*, 326 U.S. 203 (1945) ..... 2

*Board of Regents v. Tomanio*, 446 U.S. 478 (1980) ..... 6

*Cardinale v. Louisiana*, 394 U.S. 437 (1969) ..... 1, 3, 5

*Crowell v. Randall*, 10 Pet. 368, 9 L. Ed. 458 (1836) ..... 2

*Howlett v. Rose*, 496 U.S. 356 (1990) ..... 7

*Illinois v. Gates*, 462 U.S. 213 (1983) ..... 3

*Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975) ..... 6

*McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430 (1940) ..... 2

*State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154 (1945) ..... 1

*Webb v. Webb*, 451 U.S. 493 (1981) ..... 3, 5

*Will v. Michigan Department of State Police*, 491 U.S. 58 (1989) ..... 1, 3, 4, 5

*Wilson v. Garcia*, 471 U.S. 261 (1985) ..... 5, 6, 7

STATUTES

Judiciary Act of 1789, c. 20, § 25, 1 Stat. 85 ..... 1

O.C.G.A. § 50-21-21(a) ..... 4

O.C.G.A. § 50-21-23(a) ..... 4

O.C.G.A. § 50-21-24 ..... 4

O.C.G.A. § 50-21-25(b) ..... 4

O.C.G.A. § 50-21-27(b) ..... 2, 6, 7

## ARGUMENT

### I. BECAUSE THE GEORGIA SUPREME COURT DID NOT PASS ON THE APPLICABILITY OF *WILL V. MICHIGAN DEPARTMENT OF STATE POLICE*, 491 U.S. 58 (1989), TO THIS ACTION, THIS COURT MAY NOT REVIEW THAT ISSUE.

Respondent attempts to avoid a grant of certiorari by arguing that petitioner's § 1983 claim against the Georgia Department of Corrections is barred by *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). Although the parties briefed this issue in the trial court, with petitioner contending that *Will* does not bar a § 1983 claim against a state agency when a State has made a legislative decision to strip that agency of sovereign immunity, (*see, infra*, at 3-5), *none of the lower courts passed on the issue*. The trial court expressly "deem[ed] it unnecessary to consider the issue of whether Defendant Department of Corrections is a person within the meaning of 42 U.S.C. § 1983." App., 9a. Neither the Georgia Court of Appeals nor the Georgia Supreme Court addressed the applicability of *Will* either expressly or by implication. App., 1a-6a.

Because the Georgia Supreme Court did not pass on the question of whether plaintiff's § 1983 claim is permissible under *Will*, this Court is precluded from doing so. *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 160 (1945) ("Since the Wisconsin Supreme Court did not pass on the question, we may not do so."); *see Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (discussing "early established" authority holding that "the Judiciary Act of 1789, c. 20, § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and

decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' ") (*quoting Crowell v. Randall*, 10 Pet. 368, 391, 9 L. Ed. 458, 467 (1836)); *Bailey v. Anderson*, 326 U.S. 203, 207 (1945) (Supreme Court was "without jurisdiction" to review question not passed on below).

This Court's decision in *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430 (1940), is apposite:

> By virtue of the petition for certiorari addressed to the constitutional question which the state court decided, this Court has jurisdiction of the cause. And respondent, in urging decision here of the constitutional questions not pressed in the state court, relies on the familiar rule of appellate court procedure in Federal courts that, without a cross petition or appeal, a respondent or appellee may support the judgment in his favor upon grounds different from those upon which the court below rested its decision. **But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the Federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below.**

309 U.S. at 434 (emphasis supplied) (citations omitted).

Thus, this Court's review of the decision below is limited to the question of whether federal law requires application of O.C.G.A. § 50-21-27(b) to petitioner's § 1983 claim. The state trial court must be provided the opportunity to pass on the separate question of whether *Will* applies to petitioner's § 1983 claim.

## II. THIS COURT SHOULD ALLOW THE GEORGIA COURTS TO PASS ON PETITIONER'S ARGUMENT THAT *WILL* DOES NOT PRECLUDE HER § 1983 CLAIM AGAINST RESPONDENT.

Even if this Court's rule prohibiting the resolution of questions not passed on by a state court were a prudential rather than a jurisdictional limitation, (*see Illinois v. Gates*, 462 U.S. 213, 218-22 (1983)), "there are sound reasons for" permitting the Georgia courts to pass on petitioner's argument that the Georgia Department of Corrections is a "person" for purposes of § 1983. *Cardinale*, 394 U.S at 439. Petitioner has advanced in the trial court a strong argument that when a State withdraws sovereign immunity from state agencies and consents to suits against such agencies – as Georgia has done in its Tort Claims Act – those agencies are suable "person[s]" under § 1983. This Court should permit the Georgia courts to pass on this argument, which turns to a large degree on the scope of the Georgia legislature's waiver of sovereign immunity, and to apply properly the decision in *Will*. *See Webb v. Webb*, 451 U.S. 493, 499 (1981) ("there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts"); *Allen v. McCurry*, 449 U.S. 90, 105 (1980) (noting this Court's "expression of confidence in [the] ability" of state courts "to uphold federal law").

In *Will*, this Court held in a 5-4 decision that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." 491 U.S. at 71. The primary rationale for this decision was that the doctrine of sovereign immunity protects states from being sued without

their consent. *Id.* at 67. This Court noted that it "is an 'established principle of jurisprudence' that the sovereign cannot be sued in its own courts without its consent." *Id.* (citation omitted).

After *Will* was decided, the Georgia legislature enacted a Tort Claims Act pursuant to which it removed sovereign immunity from state agencies and consented to suits against such agencies. O.C.G.A. §§ 50-21-23(a), 50-21-25(b) (1994). Although the Act lists a number of claims for which state agencies will *not* be liable, section 1983 claims are not included on that list. O.C.G.A. § 50-21-24 (1994). Thus, the Georgia General Assembly made no attempt to exclude § 1983 claims from its waiver of sovereign immunity for state agencies. Under the rationale of *Will*, when a state withdraws the protection of sovereign immunity from and consents to suits against state agencies, those agencies become "person[s]" subject to § 1983 liability. *See Will*, 491 U.S. at 67 n.7 (municipalities are "persons" under § 1983 because they are not protected by sovereign immunity). The Tort Claims Act is an exercise of Georgia's authority to limit the scope of its sovereign immunity and to provide additional remedies for governmental misconduct by subjecting state agencies to § 1983 liability in Georgia courts. *See* O.C.G.A. § 50-21-21(a) (1994) (purpose of the Act is to redress "the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity").

This Court's jurisprudence establishes that the Georgia courts should have the first opportunity to pass on the foregoing argument:

> In the first place, although the States are sovereign entities, they are bound along with their officials, including their judges, by the Constitution and the federal statutory law. Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements.

*Webb*, 493 U.S at 499. Moreover, because the trial court did not reach petitioner's argument, the record below provides an insufficient basis for this Court to pass on the applicability of *Will* to this action. *See Cardinale*, 394 U.S. at 439 ("the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind").[1]

## III. RESPONDENT'S RELIANCE ON *WILSON V. GARCIA*, 471 U.S. 261 (1985), IS MISPLACED.

Respondent's sole argument addressed to the merits of this petition is that *Wilson v. Garcia*, 471 U.S. 261 (1985), dictates the application of O.C.G.A. § 9-3-33 to petitioner's § 1983 claim. This argument misses the point. As this Court noted in *Wilson*, "In virtually all statutes of

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[1] To the extent this Court deems it necessary or appropriate to review the applicability of *Will* to petitioner's § 1983 claim, petitioner respectfully requests that the Court grant certiorari on that question as well as the question raised in her petition so that she may have a full and fair opportunity to brief the *Will* issue.

limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application." 471 U.S. at 269 n.17 (*quoting Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 464 (1975)). *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), which *Wilson* cites and follows, establishes that state tolling rules are "binding rules of law" that *must* be applied to § 1983 claims unless those rules are inconsistent with federal law. *Tomanio*, 446 U.S. at 484-85; *see id.* at 486 (" ' "In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, **and exceptions thereto**, on the prosecution of a closely analogous claim." ' ") (emphasis supplied).

O.C.G.A. § 50-21-27(b) (1994) is a tolling rule that is consistent with federal law and thus must be applied to petitioner's § 1983 claim. The statute singles out tort claims accruing during a specific time period and provides litigants with, as respondent itself states, an "**extension of the two-year statute of limitations period.**" Brief of Respondent, p. 10 (emphasis supplied). "[E]xceptions to the statute of limitations are generally referred to as 'tolling' and, as more fully discussed in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), are an integral part of a complete limitations policy." *Tomanio*, 446 U.S at 488. Thus, under *Tomanio*, section 50-21-27(b) *is* a tolling rule, *is* part of Georgia's limitations policy for claims asserted under the Tort Claims Act and *must* be applied to petitioner's § 1983 claim. *Id.* at 485 (a court may "disregard an otherwise applicable state rule of law only if the state law is 'inconsistent with the Constitution and laws of the United States' ").

Moreover, respondent's argument concerning *Wilson* wholly ignores the antidiscrimination principle contained in the Supremacy Clause. Petition for Certiorari, pp. 17-22. If the Georgia Supreme Court may construe and apply § 50-21-27(b) so as to provide an extended limitations period for state law claims, but not for § 1983 claims, the State of Georgia will have discriminated against a federal cause of action in precisely the manner prohibited by *Howlett v. Rose*, 496 U.S. 356 (1990). Respondent's attempted reliance on *Wilson* is unavailing: *Tomanio* and the antidiscrimination principle of the Supremacy Clause require the application of § 50-21-27(b) to petitioner's § 1983 claim.[2]

Respectfully submitted,

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[2] Indeed, *Wilson* itself relies on a "federal interest" in ensuring that limitations periods "not discriminate against the federal civil rights remedy" in § 1983. 471 U.S. at 276.